July 23, 2013

VIA UPS

Robert Venchiarutti
Deputy Commissioner, Money Transmitters Division
Department of Business Oversight
Division of Financial Institutions
45 Fremont Street, Suite 1700
San Francisco, CA 94105-2219

Re: California Public Records Act Request (Government Code § 6250)

Dear Mr. Venchiarutti:

Enclosed for your reference is a copy of a Petition for Determination of Use of Underground Regulations ("Petition") by what was once the Department of Financial Institutions ("DFI") and is now the Department of Business Oversight ("DBO"). The enclosed Petition has been sent to the Office of Administrative Law ("OAL") for its review concurrent with the submission of this notice to DBO. We submit the enclosed copy of the Petition and its enclosures pursuant to Title 1, Section 260(a) of the California Code of Regulations.

Very truly yours,

Thomas P. Brown
Lecturer, School of Law, U.C. Berkeley

Enclosures

July 23, 2013

VIA UPS

Office of Administrative Law
Attn: Chapter 2 Compliance Unit
300 Capital Mall, Suite 1250
Sacramento, CA 95814

Re: Petition for Determination of Use of Underground Regulations by the Department of Business Oversight

Dear Sir or Madam:

Please find enclosed the following petition and attached exhibits ("Petition") alleging the existence and use of underground regulations by what was once the Department of Financial Institutions ("DFI") and is now the Department of Business Oversight ("DBO or "the Department"). The undersigned brings this Petition pursuant to Section 11340.5 of the California Government Code and Title 1, Section 260 of the California Code of Regulations.

The undersigned respectfully requests that the Office of Administrative Law accept this Petition and issue a determination, pursuant to Section 270 of the California Code of Regulations, that DBO's written and unwritten policies, standards, and statutory interpretations are illegal underground regulations. Concurrent with this Petition, the undersigned has submitted a Public Records Request to DBO pursuant to Section 6250 *et seq.* of the Government Code, requesting the disclosure of all policy statements, advice and/or opinion letters, internal memoranda and other communications (both internal and external) regarding DBO's interpretation and enforcement of the Money Transmission Act, Fin. Code. § 2000 *et seq.*

Very truly yours,

Thomas P. Brown
Lecturer, School of Law, U.C. Berkeley

Enclosures

I. INTRODUCTION

California is widely regarded as the nation's innovation and technology capital. Many of the technologies that shape the modern economy were conceived, developed and perfected in California. The smart phone, integrated circuit and, of course, the World Wide Web have changed how people work and live. Each was brought to life by people and businesses resident in California.

But California has also served as an incubator for innovation in industries not generally associated with technology. In particular, California has been home to companies that have shaped the consumer financial services industry. Since A.P. Giannini founded the Bank of Italy in San Francisco in 1904, California businesses and entrepreneurs have played key roles in the development of consumer credit, credit cards, debit cards and electronic payments.[1] The developments not only provided millions of consumers with access to services that were once reserved for the nation's elite, but they also enabled California companies to take on and, in some instances, replace well-financed incumbents. Unfortunately, recent legislative changes have cast a shadow on this legacy.

In 2010, acting largely at the behest of an industry consortium, the California legislature significantly increased the regulatory burden facing innovators in the electronic payment industry with the passage of the California Money Transmission Act ("MTA"). *See* Cal. Fin. Code § 2000 *et seq*. Before the MTA was signed, California only required companies that issued money orders and travelers checks or that helped to move money abroad to obtain a license to operate their businesses. The MTA extended this licensing requirement to *domestic* money transmitters as well as stored valued providers.

That industry incumbents would have called upon the California legislature to increase regulatory burdens may seem somewhat surprising. But regulation can be an effective barrier to competition, particularly when technology is rapidly breaking down those barriers, which has certainly been the case in the financial services industry over the past decade. Historically, opportunities in the consumer financial space have been limited by geography. In order to provide consumers with services, firms needed to have physical locations or agents located near their customers. Advances in wireless broadband communications and the emergence of the smart phone as a mainstream consumer product have eroded the importance of physical geography. Simply put, when a consumer can download "the app for that," whatever that financial service happens to be, the location of the branch or storefront becomes much less important.

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[1] The Money Transmission Act itself recognizes California's status as a hub of innovation. *See* Cal. Fin. Code § 2001(a) ("Money transmission businesses conduct a significant amount of business in this state and technological advances are occurring in the provision of money transmission services.").

Perhaps because the legislation originated with the industry, the MTA is not a model of legislative clarity. The statute does not define many of its key terms, and even where terms are defined, the statutory definitions are vague and, in at least two instances, circular. For example, the MTA defines "money *transmission*" as "[r]eceiving money for *transmission*." Cal. Fin. Code § 2003(o)(3) (emphasis added). It later defines "*receiving money for transmission*" as "*receiving money* or monetary value ... *for transmission* ... ." Cal. Fin. Code § 2003(s). The statute also delegates broad authority to DBO, the agency charged with enforcing the MTA, to grant exemptions to the MTA that DBO finds to be in the "public interest." Cal. Fin. Code § 2011.

The challenge of reconciling this statute with rapidly evolving technology has fallen to DBO. To this point, DBO has not met the challenge. In the two-plus years that have elapsed since the California legislature enacted the MTA, DBO has yet to issue a single regulation interpreting the statute.[2] DBO's failure to issue regulations regarding its standards for granting exemptions has increased the regulatory uncertainty surrounding these matters to private industry and, as we all know, uncertainty inhibits innovation. Entrepreneurs and businesses seeking to innovate in the payment business do not know whether they need to obtain a license from DBO or whether their activities are exempt from regulation.

DBO's public position is that such companies must assemble an application, meet with DBO staff, and discuss, in order to confirm whether their activities constitute "money transmission." Because the stated requirements for obtaining a meeting with DBO include a completed application that satisfies the statutory requirements for obtaining a license, this is often a costly, time-consuming and insurmountable barrier. Moreover, even companies that obtain a meeting and receive guidance from DBO are frequently left guessing as to why they may need a license when others have reportedly received an exemption.[3]

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[2] *See* http://www.dbo.ca.gov/Laws_&_Regs/Regulations.asp (listing no regulations that have been issued under the MTA).

[3] *See* http://news.ycombinator.com/item?id=2711525 (speculating about exemption status of certain money services startup companies); http://www.quora.com/WePay/Does-WePay-have-a-money-transmitter-license# (Quora post purportedly confirming exemption status of WePay).

DBO's failure to follow the prescribed process for notice-and-comment rulemaking has deprived it of a wealth of expertise and information that could be brought to bear on the challenging issues underlying the MTA. DBO's Deputy Commissioner of the Money Transmitter's Division himself has acknowledged that "Examiners need legal support" to properly interpret and apply the MTA to a myriad of new technologies and business models.[4] Where so much is at stake for private industry, an open rulemaking process is certain to attract talent and energy commensurate with the complexity and significance of the issues. Indeed, Justice Brandeis' famous maxim that "[s]unlight is said to be the best of disinfectants" promises a quality resolution for the state of California. And, as so often in the past, California's solution could provide an example for other states and the nation as a whole.

In summary, DBO's byzantine policies have harmed California consumers by suppressing innovation and increasing the cost of doing business. As this petition will demonstrate, DBO's policies also have violated the law.

II. THE NEED FOR REGULATIONS INTERPRETING THE MTA

DBO's failure to engage in notice-and-comment rulemaking has resulted in serious confusion regarding the scope of DBO's enforcement authority. In particular, DBO's failure to clarify three key aspects of the MTA licensing regime has created risk and uncertainty among firms that engage in any aspect of the movement of funds among unrelated entities, for fear that they might be violating the MTA and could be subject to fines and other sanctions.

A. What is "money transmission"?

The most important issue left unaddressed by DBO is the meaning of the phrase "money transmission." Because the licensing process is so burdensome, any company that engages in the transfer of funds among unrelated entities would be advised to consider whether those activities could be construed as "money transmission" under the terms of the MTA. Although the statutory definition of "money transmission" embraces essentially every individual, business and household in California (*i.e.*, who in California does not receive money from someone that does not later get delivered to someone else?), DBO has not offered *any* administrative guidance in the form of examples, clarifying language, or interpretive regulations to help people understand whether they fall within the scope of the statute.

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[4] *See* California Department of Financial Institutions, Money Transmitter Division, *Developments and Issues in MSB Supervision*, Aug. 23-26, 2011, http://www.csbs.org/development/Documents/MSBSupervisionVenchiarutti.pdf at p. 25.

The statute defines "money transmission" as "[s]elling or issuing payment instruments," "[s]elling or issuing stored value," or "receiving money for transmission."[5] As noted above, this last sentence, if read literally, appears to embrace every person, household, and company in California. Everyone receives money from someone and delivers it to others. Yet DBO has said very little about what constitutes "money transmission." DBO's only official statement on the issue appears to be that a party that does not actually receive custody of funds, but instead identifies a bank as the recipient of funds, is not a money transmitter.[6]

Although DBO has not explained its views on this issue, there is evidence that it has reached a private conclusion about what kinds of activity constitute money transmission. In a 2011 presentation that DBO later made public, the Department's Deputy Commissioner of the Money Transmitter's Division suggested that money transmission could be identified by posing two questions: (1) do you take funds/value from A and agree to pay them to B; and/or (2) do you take funds/value from A, and store it so that A can make purchases from third parties or take cash out at a later date.[7] In addition, DBO has publicly rejected the argument that activities defined to be outside the scope of the Federal definition of "money transmission" are also outside the scope of the state definition of that same term.[8]

But these hints are not a substitute for actual regulations. They do very little to clarify the circumstances when a Californian can receive funds in its own name, assume obligations to pay others, and yet avoid designation as a money transmitter.

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[5] Cal. Fin. Code § 2003(o).

[6] Department Opinion Letter, "Software Company that Does Not Have Possession or Control of Money – Not Subject to Money Transmission Act" (May 16, 2013), http://www.dbo.ca.gov/Laws_&_Regs/orders_files/Opinion-Software_Company_Letter.pdf.

[7] *See* California Department of Financial Institutions, Money Transmitter Division, *Developments and Issues in MSB Supervision*, Aug. 23-26, 2011, http://www.csbs.org/development/Documents/MSBSupervisionVenchiarutti.pdf at p. 10.

[8] *See* Department Opinion Letter (February 17, 2011) (no longer publicly available through DBO's website, but attached hereto as Exhibit A).

B. Under the MTA, who must obtain a license (and who is exempt)?

The MTA authorizes the Commissioner to exempt certain entities from the statute's licensing requirements.[9] And DBO has exercised this authority. It has not, however, issued regulations explaining how or why it has exercised this authority in some instances but not others. DBO's limited release of its opinions and orders (*see* Section III, *infra*) indicates that it believes that the "public interest exemption" covers at least three categories of firms: (1) agents of an FDIC-insured bank; (2) companies that are subject to regulation by another California agency; and (3) firms that fall outside DBO's interpretation of "money transmitters." But the letters do not explain the basis for these apparent exemptions or address whether companies in similar, though not identical circumstances, are also exempt—*i.e.*, companies that are regulated by other states or the Federal government.

C. What must a prospective licensee do in order to obtain an MTL?

DBO has offered no public guidance describing what a prospective licensee must do to obtain an MTL. Although the statutory requirements seem clear, DBO appears to have embellished them, but again has done so without publishing regulations explaining its policies or its reasons for adopting those policies.

The statute lays out specific terms for obtaining an MTL. Under the statute, the Commissioner may only grant a license if the following conditions are satisfied:

- The applicant has adequate tangible shareholders' equity (as specified by statute) to engage in the business of money transmission, and the financial condition of the applicant is otherwise such that it will be safe and sound for the applicant to engage in the business of money transmission;
- The applicant, the directors and officers of the applicant, any person that controls the applicant, and the directors and officers of any person that controls the applicant are of good character and sound financial standing;
- The applicant is competent to engage in the business of money transmission;
- The applicant's plan for engaging in the business of money transmission affords reasonable promise of successful operation; and

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[9] Cal. Fin. Code § 2011.

- It is reasonable to believe that the applicant, if licensed, will engage in the business of money transmission and will comply with all applicable provisions of the MTA.[10]

In addition to these requirements, an applicant must be able to demonstrate that it has the financial wherewithal to maintain at least $500,000 in tangible shareholders' equity at all times,[11] to obtain a surety bond somewhere in the range of $250,000 to $7 million,[12] and to pay an annual license fee of at least $2,500.[13]

DBO appears to have elaborated on these otherwise clear statutory requirements through unpublished interpretations. For instance, MTL applicants and potential applicants have reported that the capital requirements imposed by DBO are actually much higher than the $500,000 statutory requirement, and often are in the range of several millions of dollars.[14] Others report that DBO's post-licensing oversight goes well beyond the examination and audit functions that appear in the MTA.

III. DBO'S USE OF UNDERGROUND REGULATIONS TO ADMINISTER THE MTA

Recently, DBO has released a limited number of its letters and memoranda issued in response to requests for advice or opinions regarding its interpretation and enforcement policies under the MTA.[15] The published policies and standards set forth in these letters show that DBO is using underground regulations to administer the MTA, including to grant licensing exemptions. Indeed, the MTA provides that DBO's decision to exempt a person or entity under Section 2011 is *itself* considered a "regulation or order."[16] As such, DBO's granting of exemptions using policies and standards that have not been adopted pursuant to notice and comment rulemaking procedures constitutes illegal underground regulation in violation of the Administrative Procedure Act ("APA").

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[10] Cal. Fin. Code § 2033.
[11] Cal. Fin. Code § 2040(a).
[12] Cal. Fin. Code § 2037(e).
[13] Cal. Fin. Code § 2038(c)–(e).
[14] *See Think Computer Corp. v. Venchiarutti*, Case No. 11-5496, at ¶¶ 49-55 (N.D. Cal. Jan. 31, 2012) (First Amended Complaint) (describing plaintiff's attempts to ascertain the capital requirements that would apply pursuant to the MTL process based on in-person meetings with DFI).
[15] DBO has indicated that the selected group of released letters may not necessarily be in line with current Department policy, warned against reliance on the published letters, and reserved the right to qualify, withdraw or retract any of the letters), *available at* http://www.dbo.ca.gov/Laws_&_Regs/legal_precedents_system/default.asp.
[16] Cal. Fin. Code § 2011.

DBO has made only a small number of these exemption decisions available publicly. And, DBO's published letters do not provide any insight as to whether any entities have sought but been denied an exemption. If and when DBO responds to the undersigned's Public Records Request, additional examples of the Department's use of underground regulations may be disclosed.

A. DBO's opinion letters stating policies of general application constitute written regulations developed in violation of the APA

The Office of Administrative Law ("OAL") and California courts have long recognized that letters providing interpretive guidance applicable to a general class of people or entities are "regulations" subject to the requirements of the APA. For instance, in an OAL petition that challenged a form letter issued by the Department of Motor Vehicles ("DMV"), which revised a provision of the Driver Safety Manual, OAL concluded that the policy change stated in the letter was a "regulation" under the APA.[17] Because the policy change was applicable to a general class of drivers, and included requirements that differed from existing law, OAL determined that the DMV had used an illegal underground regulation.[18]

Courts have likewise held that agency letters can form the basis of a challenge to underground regulation by stating a policy of general application. *County of Butte v. Emergency Med. Servs. Auth.*, 187 Cal. App. 4th 1175, 1202 (2010) (state agency's interpretation of statutory language set forth in letters sent to regulated entities represented a "generally applicable policy subject to the rulemaking procedures of the APA"); *Winzler & Kelly v. Dep't of Indus. Relations*, 121 Cal. App. 3d 120, 127-28 (1981) (agency's coverage decision stated in a letter addressed to a specific firm fell within the statutory definition of "regulation" because the determination "had statewide significance and applicability and was issued to implement, interpret and make specific the prevailing wage law"); *Goleta Valley Cmty. Hosp. v. Dep't of Health Servs.*, 149 Cal. App. 3d 1124, 1129 (1983) (letter sent to a group of 19 hospitals interpreting the appeals provisions of the California Administrative Code was invalid for failure to comply with APA).

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[17] 2000 OAL Determination No. 1 (Department of Motor Vehicles, Jan. 13, 2000, Docket No. 99-003).

[18] *See also* 1998 OAL Determination No. 7 (Department of Social Services, June 18, 1998, Docket No. 91-001) (agency rule set forth in letter sent to district attorneys was a "regulation" because it applied statewide to all applicants for a specific class of services). *Cf.* 2001 OAL Determination No. 3 (Department of Toxic Substances Control, March 28, 2001, Docket No. 99-023) (department's definition of "recycling" did not constitute a "regulation" under Government Code Section 11342.600 because the department's interpretation "was directed to a specific person or entity based on peculiar facts and circumstances that did not apply generally throughout the state").

Although only a handful of the published DBO letters address the substantive provisions of the MTA, even this limited sample evidences a written policy driving DBO's interpretation of the "public interest" exemption, as well as an unwritten policy with regard to classifying certain businesses as lying outside of the MTA regulatory scheme.

1. DBO has written policies concerning the MTA "public interest" exemption

Four of the publicly-available letters grapple with whether a particular firm is engaged in "money transmission" under the MTA and, if so, whether the requestor might nonetheless be exempt from licensing under the "public interest" exemption.[19] These letters demonstrate that DBO does have written policies regarding the scope of the "public interest" exemption, though it has not subjected those policies to the requirements of the APA.

Three of the letters seek guidance as to whether the MTA would apply to an entity working with a bank issuer of open-loop stored value cards. The letters offer slight variations on a generic response. The response letters note that in the proposed programs, "the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement."[20] The letters also note that the requestor "would not hold any cardholder funds" that were associated with the programs, "[a]ll funds would be immediately loaded onto a card," and "the Bank would immediately be liable to the cardholder for the funds."[21] Two of the letters mention that under the programs, settlement with the bank would occur "on a daily basis" or "the next business day."[22] All three of the letters point out that "[o]nly the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card."[23] The letters then offer a conclusion that reflects DBO's determination on the issue of the exemption: according to each letter, DBO views such programs to be "banking product[s]" that are "already subject to the regulatory scheme applicable to the banking system."[24]

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[19] *See* Department Opinion Letter, "Credit Counseling Agency - Subject to Money Transmission Act" (February 22, 2011), http://www.dbo.ca.gov/Laws_&_Regs/orders_files/Opinion-Credit_Counseling_Agency.pdf ; Department Opinion Letter, "Bank Issued Stored Value Card - Not Subject to Money Transmission Act" (April 18, 2011), *available at* http://www.dbo.ca.gov/Laws_&_Regs/orders_files/Opinion-Bank_Issued_Stored_Value_Card-April_18_2011.pdf; Department Opinion Letter, "Bank Issued Re-loadable Stored Value Cards - Not Subject to Money Transmission Act" (June 14, 2011), *available at* http://www.dbo.ca.gov/Laws_&_Regs/orders_files/Opinion-Bank_Issued_Re-loadable_Stored_Value_Cards.pdf; Department Opinion Letter (June 17, 2011) (no longer publicly available through DBO's website, but attached hereto as Exhibit E).

The three letters offer what appears to be a consistent rationale for this conclusion. Each letter explains that the requestor's activities would fall within the definition of "money transmission" because the requestors had planned to sell stored value cards in California.[25] Nevertheless, the letters explain that the "public interest" exemption applies.[26] As the letters lay out, the stored value cards are "bank-issued and FDIC insured," and "the risk of loss of customer funds resides with the Bank at all times."[27] This, according to the letters, renders licensing under the MTA "*unnecessary*" since granting a license "would subject [the requestor] to two regulatory schemes, and would confuse jurisdiction."[28]

Another letter analyzes a different question—whether the MTA applies to credit counseling agency ("CCA") that offers and provides debt management plans ("DMP") to

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[20] *See* Department Opinion Letter (April 18, 2011); Department Opinion Letter (June 14, 2011); and Department Opinion Letter (June 17, 2011) (identical language used in each letter).

[21] *Id.*

[22] Department Opinion Letter (April 18, 2011) and Department Opinion Letter (June 14, 2011).

[23] *See* Department Opinion Letter (April 18, 2011); Department Opinion Letter (June 14, 2011); and Department Opinion Letter (June 17, 2011) (identical language used in each letter).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* (emphasis added).

California consumers—but comes to a similar conclusion.[29] Here, the application of the MTA turns on whether the CCA's receipt of money from consumers and distribution of funds to creditors constitutes "money transmission" for purposes of the MTA. The response letter concludes without much explanation that such activity does constitute "money transmission." [30] Again, however, the letter concludes that no license is required. The letter explains that "CCAs are already licensed and regulated by the California Department of Corporations," and it points out, consistent with the same private policy articulated by the responses discussed above, that additional regulation and licensing under the MTA would be "duplicative" and "would result in CCAs being subject to two regulatory schemes and would confuse jurisdiction."[31]

DBO's written policies regarding application of the "public interest" exemption expressed in Cal. Fin. Code § 2011 constitute illegal underground regulation. The "public interest exemption" set forth in the MTA contains two requirements: (1) that regulation is "not necessary," and (2) that offering an exemption is in the "public interest."[32] The letters issued by DBO publish a standard that appears to apply to all similarly situated companies. DBO has interpreted "not necessary" to mean duplicative of (or overlapping with) another licensing regime. DBO's reliance on this standard as a general policy and its application of this standard to various classes of entities in California (sellers of stored value cards and CCAs) establish that DBO is using underground regulations to administer the MTA. By doing so, DBO is violating the APA.

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[29] *See* Department Opinion Letter (February 22, 2011).

[30] *Id.*

[31] *Id.* In this letter, DBO further points out that "CCAs' business of money transmission is *incidental* to its credit counseling activities," which are the focus of their business. *Id.* (emphasis added). Although DBO mentions this aspect of the program in support of its decision to offer an exemption, it is unclear (or at least unstated) how the "incidental" nature of the money transmission activities supports the grant of an exemption under the "public interest" exemption. What is clear, however, is that DBO likely has an additional policy with respect to "incidental" money transmission activities, which is likewise unwritten and has not been adopted pursuant to the required APA rulemaking procedure.

[32] Cal. Fin. Code § 2011.

2. DBO has unwritten policies concerning the definition of "public interest" and "money transmission" under the MTA

At the same time, the letters demonstrate that DBO is relying on unwritten policies to apply the second prong of the "public interest" exemption—*i.e.*, the "public interest" and to determine whether an entity's activities fall within the scope of the MTA.

First, the letters offer no explanation of how DBO defines "public interest." Instead, the letters simply conclude that "not necessary" satisfies "the public interest" prong. Although the conclusion seems sensible (*i.e.*, if a particular provider is covered by another regulatory regime, an exemption would seem to be in the "public interest"), the APA requires DBO to explain the basis of its decision to ensure that other firms receive the same treatment, and it has not done so.

Second, one letter shows that DBO relies on unwritten policies or standards to determine whether an entity's activities fall outside of the statutory definition of "money transmission" under the MTA. In a letter addressing a seller of stored value cards, DBO notes that the requestor *would not* be subject to MTA licensing requirements, at least with regard to the part of its program where it serves "as a processor and program manager for the bank issuing the stored value cards."[33] This letter indicates that DBO apparently recognizes the existence of a "processor" exception to the definition of "money transmitter." But again, it offers no guidance or statutory interpretation to clarify why processors fall outside the definition of "money transmitter."

Third, another letter suggests that DBO has interpreted the term "money transmission." In its letter granting an exemption to CCAs, DBO explains that a firm that "receives debtors' funds and thereafter distributes, or transmits, those funds to the debtors' creditors in accordance with the terms of the repayment plan" would "receive money for transmission" and be required to obtain a license, unless exempt.[34] These statements seem to demonstrate the existence of an additional unwritten policy or standard that DBO applies in defining the term "money transmission."

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[33] *See* Department Opinion Letter (June 17, 2011) (concluding, without explanation, that the requestor's "processor and program management services for the Bank and for the mobile top-up minutes feature with the two Programs would not constitute 'money transmission' as that term is defined" in the MTA).

[34] *See* Department Opinion Letter (February 22, 2011).

A copy of each of these letters is attached to this Petition as Exhibits A through F. The policies on which DBO relied to issue these letters constitute underground regulations under the APA.

B. DBO's written and unwritten policies, standards, and statutory interpretations are "regulations", and are not exempt under any express exemptions available under the Financial Code or the APA

The APA establishes procedures that state agencies must following when adopting regulations. State agencies are required to:

- give notice to the public of the proposed regulatory action, Cal. Gov't Code § 11346.4, 11346.5;
- issue a complete text of the proposed regulation and a statement of reasons for the regulation, Cal. Gov't Code § 11346.2(a), (b);
- give interested parties opportunity to comment on the proposed regulation, Cal. Gov't Code § 11346.8;
- respond in writing to public comments, Cal. Gov't Code § § 11346.8(a), 11346.9; and
- forward a file of all materials on which the agency relied in the regulatory process to the OAL, Cal. Gov't Code §11347.3, where the regulation will be reviewed for consistency with the law, clarity, and necessity, Cal. Gov't Code §11349.1, 11349.3.

Courts in California have long recognized that the requirements of the APA are necessary to ensure "that those persons or entities whom a regulation will affect have a voice in its creation." *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-69 (1996) (citing *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 204-205 (1978)). The affected parties must also have "notice of the law's requirements so that they can conform their conduct accordingly." *Id.* at 569 (citing *Ligon v. State Personnel Bd.*, 123 Cal. App. 3d 583, 588 (1981)). "Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." *Id.*

1. DBO is subject to the rulemaking provisions of the APA

As a general matter, a "state agency" under California law includes "every state office, officer, department, division, bureau, board, and commission."[35] For purposes of the

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[35] Cal. Gov't Code § 11000.

APA, any "state agency" other than "[a]n agency in the judicial or legislative branch of the state government" is subject to APA rulemaking requirements.[36]

Generally, all state agencies in the executive branch of government, which are not expressly exempted by statute, are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. *Winzler*, 121 Cal. App. 3d at 126-28. *See* Cal. Gov't Code §§ 11340, 11342.520 and 11346; *Poschman v. Dumke*, 31 Cal. App. 3d 932, 942 (1973) (agency created by the Legislature is subject to and must comply with APA), *disapproved on other grounds by Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 204 n.3 (1978).

DBO is not in the judicial or legislative branch of government. Nor is there a specific statutory exemption that would permit DBO to make rules without complying with the APA.[37] Accordingly, DBO is a state agency subject to the requirements of the APA with regard to its rulemaking authority under the MTA.

2. DBO's written and unwritten policies are "regulations"

Under the APA, a "regulation" is broadly defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."[38] The APA requires that state agencies must not "issue, utilize, enforce, or attempt to enforce" any "regulation" as defined under Government Code Section 11342.600, unless the proper APA procedures have been followed prior to adoption of the regulation.[39]

To determine whether a rule or policy is a "regulation" for purposes of the APA, courts and OAL have followed a two-part test:

- First, is the challenged rule either: (i) a rule or standard of general application, or (ii) a modification or supplement to such a rule?

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[36] Cal. Gov't Code § 11340.9(a).

[37] Indeed, the Financial Code expressly grants the Commissioner the authority to issue regulations "consistent with law." Cal. Fin. Code § 326. While certain administrative powers are expressly carved out of APA requirements, *see, e.g.*, Cal. Fin. Code §§ 332(c)(1) and 8054(c), there is no explicit carveout for any of the provisions of the MTA.

[38] Cal. Gov't Code. §11342.600.

[39] Cal. Gov't Code. §11340.5(a).

- Second, has the challenged rule been adopted by the agency to either: (i) implement, interpret, or make specific the law enforced or administered by the agency, or (ii) govern the agency's procedure?[40]

If both parts of the test are satisfied, the challenged rule or policy is a "regulation" subject to the APA. In applying this test, OAL must resolve "any doubt as to the applicability of the APA's requirements . . . in favor of the APA."[41]

a. DBO's written and unwritten policies are standards of general application

For an agency policy to be a "standard of general application," it must only apply to all members of a class, kind, or order. *Roth v. Dep't of Veterans Affairs*, 110 Cal. App. 3d 622, 629 (1980). The rule need not apply "universally" for the APA to be triggered. *Tidewater*, 14 Cal. 4th at 571. Rather, "a rule applies generally so long as it declares how a certain class of cases will be decided." *Id.*

Even for policies that are stated in the context of providing guidance to an individual or restricted group, the agency's interpretation can constitute "regulation" if it provides guidelines that "are the formulation of a general policy" directed at guiding future conduct, "rather than the application of rules to the peculiar facts of an individual case. *Pac. Legal Found. v. Cal. Coastal Comm'n*, 33 Cal. 3d 158, 168 (1982). *See Tidewater*, 14 Cal. 4th at 574-575 ("A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even it if merely interprets applicable law.").

This means that DBO may not rely on the context within which the opinion letters were offered—in response to requests for determination as to the applicability of the MTA to a specific entity's activities—as an excuse for relying on house rules in violation of the APA. The *Capen* court explained this distinction as follows:

> If the interpretation arises in the course of an enforcement proceeding involving the adjudication of a specific case it is

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[40] *See Grier v. Kizer*, 219 Cal. App. 3d 422, 440 (1990) (upholding OAL's two-part test as to whether a challenged agency rule was a "regulation" under the APA definition), *disapproved on other grounds in Tidewater*, 14 Cal. 4th at 577; 2000 OAL Determination No. 1, at 5 and n.19 (Jan. 13, 2000).

[41] *Grier*, 219 Cal. App. 3d at 438.

> not a regulation subject to the APA. If the interpretation arises from a challenge to the generally applied policy of the agency, as here, ***the resolution of the ambiguity in the circumstances tendered serves to define the meaning of the agency's general policy on that occasion and does constitute an interpretive regulation.***

Capen, 155 Cal. App. 4th at 387 (emphasis added).

DBO's unwritten interpretations about the "public interest exemption" and the scope of activity that constitutes "money transmission" under the MTA also constitute generally applicable policies, which are regulations subject to the rulemaking requirements of the APA. *Id.* at 389 (voiding agency's unwritten, interpretive regulations for failure to comply with APA rulemaking requirements); *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 335-36 (2006) (an agency's unwritten, generally applicable interpretation of an ambiguous statute is a regulation subject to the APA). Nor can DBO defend these allegations of underground regulation by asserting that its policies have not been set forth in writing. The *Morning Star* court faced a similar situation and held that the existence of a "written policy" relating to the agency's interpretation was not necessary to establish a violation of the APA, because the record established that

> the Department's construction and application of [the statute] have been as fixed and far reaching as would be the case if a written policy had been issued. ***We decline to endorse an approach that would allow an agency to avoid APA requirements simply by driving its regulations further underground.***

Id. at 336 (emphasis added). Because DBO's letters demonstrate the use of general standards meant to apply to all entities that might be regulated under the MTA, its statements of policy and statutory interpretation are "regulations" subject to the requirements of the APA.

b. DBO's written and unwritten policies have been adopted to interpret and make specific certain provisions of the MTA

DBO's policies are meant to interpret and make specific certain key statutory provisions, including critical terms from the "public interest exemption," as well as provide specificity with regard to the scope of the term "money transmission." OAL precedents make clear that such policies constitute "regulation" for purposes of the APA.

For instance, in making a determination regarding a DMV rule implemented by letter directed to attorneys who frequently represented defendants in Administrative Per Se hearings, the OAL concluded that rules were unlawful underground regulations when the rules provided greater specificity to an existing statutory requirement. *See* 2000 OAL Determination No. 1 (Jan. 13, 2000). Where the statute merely provided that a person whose driving privileges were in question could obtain a hearing upon request to the DMV, and the challenged rule added the additional requirements that a hearing request must be "written" and "provide good cause," OAL concluded that such limitations "make specific the more general language of section 14103 of the Vehicle Code and thus are 'regulations.'" *Id.* at 10. *See Englemann v. State Bd. of Educ.*, 2 Cal. App. 4th 47, 62 (1991) (to the extent that an agency publication "depart[s] from, or embellish[es] upon, express statutory authorization and language," the agency is required to promulgate regulations).

In the attached letters, DBO's interpretation of the statutory phrase "not necessary" to mean duplicative of other regulatory regimes is a departure from, and embellishment of, the statutory language that should have been adopted pursuant to the notice-and-comment rulemaking procedures of the APA. Moreover, DBO's implicit recognition of an exception for "processor and program management services" provided to a bank offers a specific gloss on the statutory language that is not explained through regulation or other official policy statement of the Department.

3. DBO is Not Exempt from the APA Rulemaking Requirements

All "regulations" issued by state agencies must be adopted pursuant to proper APA procedures, unless expressly exempted by statute.[42] If "generally applicable administrative interpretation of a statute" does not fall within an express statutory exemption, then it is subject to the rulemaking requirements of the APA. *Morning Star*, 38 Cal. 4th at 335.

Express statutory APA exemptions may either be "special" or "general." *See* 2000 OAL Determination No. 1, at 11 (Jan. 13, 2000). *Cf. Winzler & Kelly v. Dep't of Indus. Relations*, 121 Cal. App. 3d 120, 126-28 (1981). "Special" express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. "General" express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. 2000 OAL Determination No. 1, at 11 (Jan. 13, 2000).

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[42] Cal. Gov't Code § 11346(a).

As explained above, DBO is not "specially" exempt from APA rulemaking requirements under the terms of the MTA. (*See* Part III.B.1, *supra*.) Nor do any of the APA's general express statutory exemptions protect DBO from compliance with the APA. The "general" express statutory exemptions listed in the APA address the following areas: local rules; internal management; forms; audit guidelines; fixes rates, prices, or tariffs; legal ruling of tax counsel; and precedent decisions.[43] Among the statutory list of exemptions, the only potentially relevant category would be the exemption for the "only legally tenable interpretation."[44] This exemption applies if the administrative interpretation is "patently compelled by . . . the statute's plain language." *Morning Star*, 38 Cal. 4th at 337. But where an agency has an "unwritten, generally applicable interpretation of an ambiguous statute," that is a "regulation" subject to the APA and the "only tenable legal interpretation" does not apply. *Capen*, 155 Cal. App. at 383; *Morning Star*, 38 Cal. 4th at 334. As shown above, the opinion letters stating DBO's written and unwritten policies with regard to its interpretation of the "public interest exemption" and the scope of the term "money transmission" are by no means the "only legally tenable interpretation" of those broad statutory terms. Accordingly, DBO's use of "regulations" in violation of the APA is not saved by any express statutory exemption.

IV. CONCLUSION

Based on the foregoing evidence of DBO's use and reliance on illegal underground regulations to administer the MTA, the undersigned respectfully requests that the OAL accept this Petition and issue a determination that DBO's written and unwritten policies, standards, and statutory interpretations violate the APA.

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[43] There are exemptions for: (1) local rules, or rules issued by the director of the Department of Corrections and Rehabilitation "applying solely to a particular prison or other correctional facility," Cal. Penal Code § 5058(c); (2) internal management, or "regulation that relates only to the internal management of the state agency," Cal. Gov't Code §11340.9(d); (3) forms prescribed by a state agency, Cal. Gov't Code § 11340.9(c); (4) audit guidelines, or "regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit . . . .", Cal. Gov't Code §11340.9(e); (5) "regulation that establishes or fixes rates, prices, or tariffs," Cal. Gov't Code. §11340.9(g); (6) legal ruling of tax counsel, or a "legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization," Cal. Gov't Code §11340.9(b); and (7) precedent decisions, or a state agency's quasi-judicial decision that is designated pursuant to Government Code Section 11425.60 as such.

[44] Cal. Gov't Code § 11340.9(f).

Petitioner's name and contact information:

Thomas P. Brown
919 Olmstead Street
San Francisco, CA 94134
(415) 856-7248
tpbrown5@gmail.com

Certifications

I certify that I have submitted a copy of this petition and all attachments to the state agency which has issued, used, enforced, or attempted to enforce the purported underground regulation.

Name of person in agency to whom petition was sent:

Robert Venchiarutti, Deputy Commissioner, Money Transmitters Division

Agency:

Department of Business Oversight, Division of Financial Institutions

Address:

45 Fremont Street, Suite 1700, San Francisco, CA 94105-2219

Telephone number:

(415) 263-8511

I certify that all of the above information is true and correct to the best of my knowledge.

Signature of Petitioner

Date

EXHIBIT A

11-1

February 17, 2011

Re: Opinion Request

Dear Mr. __________:

This responds to your letter dated October 19, 2010, in which you requested a determination as to whether the __________, a nonprofit credit counseling agency (CCA) that offers and provides debt management plans (DMP) to California consumers, would be considered engaged in "money transmission" and therefore would be required to be licensed under the recently enacted California Money Transmission Act. In the alternative, you request a determination that CCAs qualify for a public interest exemption from licensing.

FACTUAL BACKGROUND.

You describe the facts as follows. __________ is comprised of __________ nonprofit CCAs and a housing counseling agency that are recognized as exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code. Nonprofit CCAs provide debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support. In addition, to those that are eligible, CCAs generally offer the opportunity to enter into a DMP for the repayment of a consumer's unsecured debt. Through these plans, a debtor agrees to make regular deposits with the CCA, which in turn distributes the money to the consumer's unsecured creditors to pay the consumer's credit card bills, student loans, medical bills, or other unsecured debts according to a payment schedule that has been worked out with the consumer and his or her creditors. Typically, debtors' funds are transmitted to the nonprofit CCA either via ACH debits to debtors' checking accounts by the nonprofit CCA's financial institution or via money order. The nonprofit CCA deposits the funds into one or more trust accounts established by the CCA at a national or state chartered bank. The nonprofit distributes the funds to creditors either via a payment service or by paper check drawn on the CCA's account in accordance with the terms of the repayment plan.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o), in relevant part, defines "money transmission" as "receiving money for transmission." FC § 1803(s), in relevant part, defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 1806 provides for a public interest exemption to the licensing requirement of § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO CCA ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, through a DMP, a nonprofit CCA receives debtors' funds and thereafter distributes, or transmits, those funds to the debtors' creditors in accordance with the terms of the repayment plan. Thus, CCAs receive money for transmission within or outside the United States. Pursuant to FC § 1810, CCAs would need to obtain a license unless exempt.

B. Exemption.

As you note, CCAs meet the definition of "prorater" as defined in FC § 12002.1 of the California Proraters Law. As such, CCAs are already licensed and regulated by the California Department of Corporations. It would therefore be duplicative to require licensing of CCAs under the Money Transmission Act. Moreover, such licensing would result in CCAs being subject to two regulatory schemes and would confuse jurisdiction. Finally, CCAs' business of money transmission is incidental to its credit counseling activities.

For these reasons, there are hereby exempted from the provisions of Chapter 14, Division 1 of the FC, as being in the public interest and the regulation of which is not necessary, the offering and providing of DMPs to California consumers by CCAs.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

October 19, 2010

Via Overnight Mail and Email

Mr. William S. Haraf
Commissioner of Financial Institutions
California Department of Financial Institutions
45 Fremont Street, Suite 1700
San Francisco, CA 94105
wharaf@dfi.ca.gov

RE: Request for Interpretive Ruling on the California Money Transmission Act and Debt Management Plan Services.

Dear Commissioner Haraf:

On behalf of our client, the ________________________ (the "____________________")[2] we request an interpretive ruling and no-action position from the California Department of Financial Institutions (the "Department") confirming the foregoing analysis and conclusion that a nonprofit credit counseling agency ("CCA") will not be considered engaged in "money transmission," and therefore not required to be licensed under the recently-enacted California Money Transmission Act (the "Act"),[3] by virtue of offering and providing a debt management plan ("DMP") to consumers in your state. In the alternative, if you believe that nonprofit CCAs engage in "money transmission" by virtue of offering and providing a DMP, we respectfully request that you use your authority under the public interest exemption contained in

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[2] ____________________ members are nonprofit, tax-exempt 501(c)(3) organizations focused on consumer credit counseling, housing counseling, financial education and budget and debt management.

[3] California Money Transmission Act, CA A.B. 2789 (2010) (enacted Sept. 30, 2010).

Article 2, Section 1806 of the Act (the "Public Interest Exemption") to exempt nonprofit CCAs from the licensure requirements.

I. Factual Background.

A. Description of the ____________________

The ____________________ is comprised of ___________ of the leading nonprofit CCAs and a housing counseling agency that are recognized as exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code (the "Code"). Each member provides financial educational and counseling services to the public. Each agency's services are heavily and effectively regulated under federal and state law, as well as standards and guidelines established by industry trade associations and independent accrediting bodies devoted to consumer protection.

B. Credit Counseling and Debt Management Plans.

Nonprofit CCAs provide debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support. In addition, to those that are eligible, CCAs generally offer the opportunity to enter into a DMP for the repayment of a consumer's unsecured debt. Through these plans, a debtor agrees to make regular deposits with the CCA, which in turn distributes the money to the consumer's unsecured creditors to pay the consumer's credit card bills, student loans, medical bills, or other unsecured debts according to a payment schedule that has been worked out with the consumer and his or her creditors. Typically, debtors' funds are transmitted to the nonprofit CCA either via ACH debits to debtors' checking accounts by the nonprofit CCA's financial institution or via money order. The nonprofit CCA deposits the funds into one or more trust accounts established by the CCA at a national or state charted bank.)[3] The nonprofit CCA distributes the funds to creditors either via a payment service or by paper check drawn on the CCA's account in accordance with the terms of the repayment plan.

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[3] Many CCAs use electronic payment systems such as MasterCard RPPS, https://www.mastercardintl.com/rpps/lv12.cgi/cc_2, which provides electronic and bill payment presentment services. Note that California Financial Code section 12014(3) requires nonprofit community service organizations that provide DMPs to "transmit funds utilizing electronic payment processing when available." Cal Fin. Code § 12104(n)(3).

C. State Regulation of DMPs.

DMPs are heavily regulated under various statutes among the states, including the California Check Sellers, Bill Payers and Proraters Law, Cal Fin. Code § 12000 *et seq.* (the "Proraters Law"). In this regard, nonprofit CCAs may rely on the licensing exemption under Financial Code section 12104 if the organization is in compliance with the requirements of that section, and the organization files the document required under that section with the California Department of Corporations.[4]

Compliance with the Proraters Law:

1. Requires the organization to have as its principal functions consumer credit education, counseling on consumer credit problems and family budgets, and arranging or administering debt management or settlement plans;
2. Requires the organization to limit fees received from a debtor to no more than the following:
   a. For education and counseling combined, $50;
   b. For debt management plans, a sum not to exceed 8 percent of the money disbursed monthly, or thirty-five dollars ($35) per month (whichever is less); and
   c. For debt settlement plans, a sum not to exceed 15 percent of the amount of the debt forgiven.
3. Prohibits the organization from requiring up-front payments or deposits;
4. Prohibits the organization from requiring the payment of fees until the debt is successfully settled;
5. Requires the organization to maintain and keep current and accurate books, records, and accounts;

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[4] *See* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fin&group=12001 – 13000&file=12100-12108. A complete set of forms that are filed with the California Department of Corporations, including "Financial Institution" information, are available at http://www.corp.ca.gov/forms/financial.asp. A list of nonprofit CCAs that have filed the documents required by Financial Code section 12104 in order to rely on the exemption is available at http://www.corp.ca.gov/FSD/pdf/ncso.pdf.

6. Requires the organization to provide to the Commissioner, prior to engaging in business, information on where the trust account holding debtors' funds is maintained, and consent for the Commissioner to take possession of the account, if necessary for the protection of debtors;

7. Requires the organization to maintain a $25,000 surety bond;

8. Requires the organization to report account information to a debtor at least once every three months, or upon the debtor's request;

9. Requires the organization to submit to the Commissioner an audit report containing audited financial statements;

10. Requires the organization to maintain accreditation by an independent accrediting organization, including either the Council on Accreditation or the International Standards Organization;

11. Prohibits the organization from engaging in any unfair or deceptive acts or practices;

12. Requires the organization to adopt and implement best practices designed to prevent improper debt management or settlement practices and prevent theft and misappropriation of funds, including disbursement of funds no later than 15 days after receipt of funds, or by scheduled disbursement date, which is greater, and that a consumer's first disbursement be received (by creditor(s) within 90 days of agreeing to the DMP;

13. Requires the organization to adopt policies that specifically prohibit credit counselors from receiving financial incentives or additional compensation based on the outcome of the counseling process;

14. Requires the organization to resolve complaints from debtors in a prompt and reasonable manner; and

15. Requires the organization to provide written notice to the Commissioner of the Department of Corporations for the State of California within 30 days of dissolution or termination of engaging in the activities of a prorater.

The Proraters Law vests enforcement authority for these requirements with the California Department of Corporations.[5]

III. Request for Interpretive Ruling or No-Action Position.

A. DMPs Do Not Meet the Definition of Money Transmission.

CCAs engaged in DMP activity are not engaged in "money transmission" as defined in the Act inasmuch as such CCAs are not: "(1) selling or issuing payment instruments; (2) selling or issuing stored value; [or] (3) receiving money for transmission."[6] CCAs that provide DMPs do not engage in the transmission of funds solely for the purpose of transmitting funds from one party to another, as is commonly done by traditional money transmitters. CCAs only provide DMPs in connection with education and counseling services. The plain language of the statute does not evidence intent to sweep CCAs that provide DMPs into the purview of the Act's enforcement. In addition, the discussion in legislative committee reports focuses on the Act's regulation of travelers' checks, payment instruments, stored value cards, securities and money transmission entities with no physical presence in California, all of which are integrally related, not incidental, to money transmission.[7] By contrast, a DMP is only used to make payments to creditors on behalf of debtors in conjunction with a pre-determined schedule and counseling that has been provided to the consumer. Accordingly, DMP activities do not constitute "money transmission."

Further, it is important to highlight that the Financial Crimes Enforcement Network ("FinCEN") of the U.S. Department of Treasury has held that DMPs do not constitute money transmission as defined in the Department of Treasury regulations found at 31 C.F.R. § 103.11(uu). The FinCEN position is relevant as it provides insight into activities that do not meet the regulatory definition of a money transmitter, even though such activities may involve accepting and transmitting funds on an incidental basis.

In *FinCEN Ruling 2004-4 - Definition of Money Services Business (Debt Management Company),* dated November 24, 2004, FinCEN determined, under virtually identical facts and circumstances as represented herein, that a debt management company, with respect to its submission of payments to creditors in conjunction with a DMP, was "not an MSB as defined in 31 C.F.R. § 103.11 (uu).[8]" In so holding, FinCEN stated the following:

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[5] CA Fin. Code § 12105.

[6] California Money Transmission Act, A.B. 2789. Art. 1 § 1803(o) (2010).

[7] CA Assembly Banking and Finance Committee, California Money Transmission Act, A.B. 2789, Comm. Report (Aug. 18, 2010); CA Senate Banking and Finance Committee. A.B. 2789, Comm. Report (June 28, 2010).

> Whether a person is a money transmitter for BSA [Bank Secrecy Act] purposes is a matter of facts and circumstances. Based on the information contained in your letters, we conclude that [the business]'s debt management service does not constitute money transmission. As set forth in 103.11(uu)(5)(ii), FinCEN will generally not treat as a money transmitter a person engaged in the acceptance and transmission of funds "as an integral part of the execution and settlement of a transaction other than the funds transmission itself..." The general service that [the business] provides is to help debtors create a plan for payment and/or adjustment of their debts, and to obtain the agreement of creditors to accept payment under that plan. FinCEN views the money transmission that [the business] conducts as ancillary to the debt management service that [the business] provides, and incidental to a debtor's primary purpose in using the services of [the business]. To the extent that the money transmission conducted by [the business] is limited to submitting payments to creditors on behalf of debtors in conjunction with a debt management plan, FinCEN would not deem [the business] a money transmitter for purposes of 31 CFR 103.11(uu)(5).[9]

Also instructive is *FinCEN Ruling 2003-8 - Definition of Money Transmitter (Merchant Payment Processor),* November 19, 2003, in which FinCEN held that:

> The nature of the transactions you describe is the transfer of funds through the ACH system from a customer to a merchant as payment for goods and services. [ ]'s role in the transactions is to provide merchants with a portal to a financial institution that has access to the ACH system. [ ] acts on behalf of merchants receiving payments rather than on behalf of customers making payments. For these reasons, the service that [ ] provides through [ ] more closely resembles payment processing/settlement than money transmission. Therefore, to the extent that the role of [ ] in such transactions is limited to submitting payment instructions obtained from a merchant to a bank for ACH processing, and

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[8] FinCEN Ruling 2004-4 (Definition of Money Services Business (Debt Management Company)) (Nov. 24, 2004). *See also* Notice of Proposed Rulemaking, Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations - Definitions and Other Regulations Relating to Money Services Businesses, 74 Fed. Reg. 22129-22142 (May 12, 2009) (Proposed incorporation of the exclusion for debt management plans into proposed regulatory revisions of the definition of "money services business.").

[9] *Id.*

> remitting the funds received through the ACH process to the merchant (or in some cases, refunding money to the merchant's customer through an ACH transaction), FinCEN would not deem [ ] a money transmitter for purposes of 31 CFR 103.11(uu)(5).[10]

For your convenience, we have attached the above-referenced FinCEN administrative rulings.

Together, Ruling 2004-4 and Ruling 2003-8 provide strong support that DMPs, when provided by nonprofit CCAs that primarily engage in budget and debt education and counseling, are not money transmitters. DMP providers do not transmit money as a business transaction itself, but only to the extent necessary to effectuate a client's DMP. It is a logical and reasonable extension of Ruling 2004-4 to conclude that a nonprofit CCA's DMP services would not constitute money transmission under the facts and circumstances presented. Like the facts analyzed by FinCEN, the general service provided by a nonprofit CCA is to provide counseling and creation of a repayment plan. The payment portion of a DMP is ancillary to the consumer's main purpose in enrolling in the program. Thus, the services provided by a nonprofit CCA are not the practice of money transmission as contemplated by the Act.

Moreover, money transmission conventionally is regulated by the government in order to protect consumers with regard to payment instruments, stored value, and other money transmission activities as well as to address concerns about potential money laundering. Some examples of industries covered by money transmission regulation include providers of wire transfer services and stored value cards. In these industries, regulation under money transmission statutes is routine, and companies that violate the statutes are subject to fines and penalties.

Conversely, regulation of DMPs provided by nonprofit CCAs under the California Department of Corporations is directed at ensuring fees are fair and meet the standards set by the legislature as well as enforcing consumer protections tailored specifically to DMPs, which have evolved over half a century.[11] As referenced above, this regulation and oversight is accomplished by the requirement that nonprofit CCAs file documents with the California Department of Corporations and satisfy a long laundry-list of requirements in order to rely upon an exemption from the Proraters Law. Effectively, however, the exemption requirements are essentially a form of licensing and, to be clear, the California Department of Corporations has proactively used its enforcement power under the Proraters Law in cases of alleged unlicensed prorater activity by organizations that had operated in reliance upon the exemption.

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[10] FinCEN Ruling 2003-8 (Definition of Money Transmitter (Merchant Payment Processor)) (Nov. 19, 2003).

[11] The Prorater's Law was originally named the Check Sellers and Cashers Law and was enacted in 1947. *See* http://www.corp.ca.gov/FSD/check.asp.

Because providing a DMP will not fall within the definition of money transmission under Section 1802(o) of the Act, a CCA should not need to obtain licensure as a money transmitter in California or avail itself of an exemption from the licensing requirement. Given that the regulation of DMPs by the California Department of Financial Institutions would differ from the conventional notion of regulation of money transmitters, we request that your office issue an interpretative ruling to the effect that CCAs may rely upon the fact that their DMP activities fall outside of the scope of the Act. Alternatively, we request your assurance that your office would not take enforcement action against a CCA if it were to offer and provide DMPs in your state in reliance on the Public Interest Exemption.

B. Adequate Regulation under the California Proraters Law.

In the event that the Department finds that nonprofit CCAs engage in money transmission, nonprofit CCAs should be exempt from licensure as money transmitters under the Act's Public Interest Exemption because an exemption in the instant case would be consistent with the public interest, and licensure is not necessary in order to achieve the purpose of the Act. Under the Act's Public Interest Exemption, the Commissioner may grant an exemption from the Act as follows:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter. [12]

As noted above, a DMP, when provided by a nonprofit CCA, is already heavily regulated by various broad and highly-detailed federal and state regulatory schemes, including in California. In this regard, we believe that the offer and provision of DMPs to consumers should fall within the Public Interest Exemption when the provider is already regulated by the state with respect to its fees, how it holds funds, and other key characteristics when it relies upon an exemption from the Proraters Law under Financial Code section 12104.

In California, CCAs meet the definition of "prorater" under the California Proraters Law, enforced by the California Department of Corporations. Under the Proraters Law:

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[12] California Money Transmission Act, A.B. 2789, Art. 2 § 1806 (2010).

> a prorater is a person who, for compensation, engages in whole or in part in the business of receiving money or evidences thereof for the purpose of distributing the money or evidences thereof among creditors in payment or partial payment of the obligations of the debtor.[13]

The Proraters Law, however, provides a specific exemption for nonprofit CCAs in Financial Code section 12104 under which the organization is still required to comply with many of the requirements otherwise necessary for licensure as a prorater, including (among many described above): prohibitions on unfair and deceptive conduct; filing of paperwork; fee caps; record-keeping requirements; maintenance of separate client trust accounts; an irrevocable written consent that the Commissioner of the Department of Corporations may seize assets of the organization; maintenance of a bond; reporting obligations including audit reports; consumer disclosure requirements; policies and procedures specifications; and notice requirements.[14]

The Proraters Law and the Department of Corporations closely regulate DMP providers that are nonprofit organizations. In their totality, the Proraters Law exemption requirements for nonprofit CCAs are stricter than those found in the Act and are closely tailored to DMPs. The public interest is more than adequately protected by the Department of Corporation's enforcement of the Proraters Law. Duplicative regulation of nonprofit CCAs under the Proraters Law *and* the Money Transmission Act would not be in the public interest. Further, unlike other transactions that involve money transmission for the sake of money transmission, as discussed above, funds transmission is only ancillary to a DMP when provided by a nonprofit CCA. As a result, to the extent the transmission of funds takes place at all, it would only be incidental to a consumer's primary purpose of utilizing the services of the nonprofit CCA, which are primarily counseling and education, as well as assistance with obtaining creditor acceptance of a personalized budget plan created by the organization based on information obtained from the consumer. Therefore, to the extent that a nonprofit CCA engages in money transmission when providing a DMP, the Department should not deem the business to be that of a money transmitter for purposes of the Act.

III. Conclusion.

Accordingly, for the reasons set forth in this letter, we believe it is appropriate for the Department to issue an interpretive ruling to the effect that nonprofit CCA providers of DMPs are not required to be licensed as money transmitters because they do not engage in activities that constitute money transmission within the meaning of the Act. In this regard, we request your assurance through an order that your Department would not take enforcement action against nonprofit CCAs in connection with the offer and provision of DMPs in your state. In the alternative, if such activity were to be considered money transmission, we respectfully request that, pursuant to Article 2, Section 1806 of the Act, the Department grant nonprofit CCAs an exemption from the requirements of the Act and advise us of any filings, additional notices or conditions required in connection with such an exemption by individual nonprofit CCAs.

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[13] Cal. Fin. Code § 12002.1.

[14] Cal. Fin. Code § 12104.

As noted above, subject to the requirements of the Pro raters Law, nonprofit CCAs provide DMPs to consumers in financial distress. Due to the January 1, 2011 effective date of the Act, we respectfully request that you provide as soon as possible, and in any event before January 1, 2011, the above-requested confirmation or exemption, or advise us if an application or additional filings are required, so as to allow time for us to provide you with additional information that you may need prior to the effective date. We will endeavor to respond as quickly as possible to any questions or informational requests to facilitate this timing. Further, if the Department determines that licensure is necessary, we respectfully request a reasonable grace period for obtaining licensure be allowed in order for organizations to file a formal application.

* * * * * *

Thank you for your attention to this matter. If you require any additional information or have any questions please feel to contact the undersigned at ___________________.

Respectfully submitted,

Attachments

cc: Robert Venchiarutti, Deputy Commissioner, California Dept. of Financial Institutions

Financial Crimes Enforcement Network
Department of the Treasury

FinCEN Ruling 2004-4 -Definition of Money Services Business (Debt Management Company)

November 24, 2004

Dear [ ]:

This letter responds to your letter dated June 16, 2004, requesting a determination as to whether your client, [the business], is a money services business ("MSB") for purposes of regulations promulgated by the Financial Crimes Enforcement Network ("FinCEN"), under the Bank Secrecy Act ("BSA"). In response to our subsequent request, you provided additional information about [the business] by letter dated October I2, 2004. Pursuant to 31 CFR § 103.85 governing FinCEN's authority to issue administrative rulings, FinCEN has determined, based on the representations in your letters, that [the business] is not an MSB as defined in 31 C.F.R. § 103.11(uu).

You have represented that [the business] proposes to enter into business as a debt management company. In general, a debt management company holds itself out as providing services to debtors in the management of their debts. Debt management companies contract with a debtor for a fee to (i) effect the adjustment, compromise, or discharge of debts, and (ii) receive funds from debtors, and to remit such funds to creditors on a debtor's behalf.[1] Creditors that accept payments from debt management companies grant benefits to their client debtors, such as interest rate reductions, waiver of late charges, and reduction in monthly payment amounts. [The business] would make monthly payments to creditors on behalf of its client debtors. [The business] also provides debtors with access to educational resources to assist in budget planning, such as newsletters, online educational content, and financial counseling support.

A debtor client of [the business] would make a monthly payment consisting of the payment to be made to creditors on the debtor's behalf by [the business], and a fee for [the business]. Debtors' funds would be transmitted to [the business] either via ACH debits to debtors' checking accounts by [the business]'s financial institution, or money order made payable to [the business]. [The business] would deposit the funds into one or more trust accounts established by [the business] at a national banking association. [The business] would distribute the funds to creditors either via Mastercard's Remote Payment and Presentment Service, or by paper check drawn on [the business]'s account. While the majority of creditors that accept payments by [the business] on behalf of debtors are credit card companies, a small number of medical services providers and utility companies also participate. [The business] requests a determination whether FinCEN would deem it an MSB by virtue of the debt management service it would provide.

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[1] See, e,g., S.D. Codified Laws § 22-47-1 (2004).

Money services businesses, a category of financial institution for purposes of regulations implementing the BSA, are defined at 31 CFR § 103.11(uu) and include currency dealers and exchangers, check cashers, issuers, sellers, and redeemers of traveler's checks, money orders, or stored value, money transmitters, and the United States Postal Service. MSBs must comply with various reporting and record-keeping requirements, and must implement anti-money laundering programs. In addition, certain MSBs are subject to the requirement to register with FinCEN. The only MSB category into which [the business]'s business would possibly fall is money transmitter. The definition of money transmitter for purposes of BSA regulations found at 31 CFR 103.11 (uu)(5) includes:

> (A) [a]ny person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or
>
> (B) [a]ny other person engaged as a business in the transfer of funds.

Whether a person is a money transmitter for BSA purposes is a matter of facts and circumstances. Based on the information contained in your letters, we conclude that [the business]'s debt management service does not constitute money transmission. As set forth in 103.II(uu)(5)(ii), FinCEN will generally not treat as a money transmitter a person engaged in the acceptance and transmission of funds "as an integral part of the execution and settlement of a transaction other than the funds transmission itself...." The general service that [the business] provides is to help debtors create a plan for payment and/or adjustment of their debts, and to obtain the agreement of creditors to accept payment under that plan. FinCEN views the money transmission that [the business] conducts as ancillary to the debt management service that [the business] provides, and incidental to a debtor's primary purpose in using the services of [the business]. To the extent that the money transmission conducted by [the business] is limited to submitting payments to creditors on behalf of debtors in conjunction with a debt management plan, FinCEN would not deem [the business] a money transmitter for purposes of 31 CFR 103.11(uu)(5).

In arriving at our decision, FinCEN relied upon the accuracy and completeness of the representations made in your letters and submissions. Nothing precludes FinCEN from seeking further action should any of this information prove inaccurate or incomplete. FinCEN reserves the right to publish this letter as guidance to financial institutions with information redacted in accordance with your request under 31 CFR §

103.81(a)(5), and as indicated in your June 16, 2004 letter. You will have 14 days after the date of this letter to identify any other information you believe should be redacted and the legal basis for the redaction. Should you have any questions, please telephone Anna Fotias, Senior Regulatory Compliance Specialist, at 202-354-6413.

Sincerely,

//signed//

William D. Langford, Jr.
Associate Director
Regulatory Policy and Programs Division

Financial Crimes Enforcement Network
Department of the Treasury

FinCEN Ruling 2003-8 -Definition of Money Transmitter (Merchant Payment Processor)

November 19, 2003

Dear [ ]:

This letter responds to your letter dated February 5, 2003, requesting an administrative ruling with respect to whether [ ] is required to register with FinCEN as a Money Services Business in accordance with 31 CFR 103.41 by virtue of operating [ ]. Based on the representations contained in your letter, FinCEN has determined that [ ] is not a Money Services Business as defined in 31 CFR 103.11(uu), by virtue of the ACH processing services provided by [ ], and is therefore not required to register with FinCEN.

According to your letter, [ ] operates a service called [ ] that provides third-party origination services for Automated Clearing House ("ACH") transactions on behalf of merchants. Through [ ], merchants can accept customer payments for purchases made through a merchant's web site, or by telephone, in the form of a checking account debit. [ ]'s merchant customers obtain payment instructions to debit a customer's checking account and submit these payment instructions to [ ] through [ ]. [ ] batches and submits the debit information to [ ]'s bank for processing through the ACH system. Once [ ]'s bank initiates the ACH, the depository institution at which the merchant's customer maintains a checking account debits the account of the customer, and sends a credit instruction through ACH to [ ]'s bank, which then credits the amount to an operating account maintained at the bank by [ ]. After a temporary holding period to ensure that the transaction initiated by the merchant is not returned, [ ] remits the funds to the merchant. Through [ ], merchants are also able to initiate credits to provide refunds to customers. You have asked whether [ ] would be deemed a money transmitter in accordance with 31 CFR 103.11 (uu)(5) by virtue of providing this service.

The definition of money transmitter for purposes of BSA regulations found at 31 CFR 103.11(uu)(5) includes:

> (A) [a]ny person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the

> Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or
>
> (B) [a]ny other person engaged as a business in the transfer of funds.

FinCEN does not currently interpret the definition of money transmitter to include the third-party origination service that is described in your letter. The nature of the transactions you describe is the transfer of funds through the ACH system from a customer to a merchant as payment for goods and services. [ ]'s role in the transactions is to provide merchants with a portal to a financial institution that has access to the ACH system. [ ] acts on behalf of merchants receiving payments rather than on behalf of customers making payments. For these reasons, the service that [ ] provides through [ ] more closely resembles payment processing/settlement than money transmission. Therefore, to the extent that the role of [ ] in such transactions is limited to submitting payment instructions obtained from a merchant to a bank for ACH processing, and remitting the funds received through the ACH process to the merchant (or in some cases, refunding money to the merchant's customer through an ACH transaction), FinCEN would not deem [ ] a money transmitter for purposes of 31 CFR 103.11 (uu)(5).

In arriving at our decision in this matter, FinCEN relied upon the accuracy and completeness of the representations made in your February 5, 2003 letter. Nothing precludes FinCEN from seeking further action should any of this information prove inaccurate or incomplete. Finally, we note that you have requested that certain information contained in your letter be held in confidence and exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. FinCEN reserves the right to publish this letter as guidance to financial institutions with all identifying information about you, [ ], [ ], and [ ], redacted. You will have 14 days after the date of this letter to identify any other information you believe should be redacted and the legal basis for the redaction. Should you have any questions, please telephone Christine Del Toro of my staff at (703) 905-3590.

Sincerely,

//signed//

Judith R. Starr
Chief Counsel

cc: David M. Vogt, Executive Associate Director, Office of Regulatory Programs
Deborah Silberman, Chief, MSB/Casinos/IRS Programs

EXHIBIT B

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Opinion – "Credit Counseling Agency - Subject to Money Transmission Act"

February 22, 2011

Re: Opinion Request

Dear ___:

This responds to your letter dated January 18, 2011, in which you requested a determination as to whether the activities of a credit counseling agency (CCA) would be considered engaging in "money transmission" and therefore would require licensing under the recently enacted California Money Transmission Act.

FACTUAL BACKGROUND.

You describe the facts as follows. CCAs serve financially distressed consumers with the repayment of their debts to creditors through negotiated concessions (approved by the creditors) such as lowered interest rates and the elimination of late fees or penalties. (For ease of reference, we will refer to these as debt management plans or DMPs.) Through DMPs, the consumer pays a single monthly payment to the CCA which, in turn, disburses the appropriate payment as due to each creditor. In the course of serving these consumers, the CCAs are, in fact, receiving money from consumers, retaining it in trust account, and then transmitting it to creditors for the purpose of paying the customers' bills, invoices, or accounts.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 2030(a) [formerly § 1810(a)] states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this division . . . ."

FC § 2003(o) [formerly § 1803(o)], in relevant part, defines "money transmission" as "receiving money for transmission." FC § 2003(s), in relevant part, defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 2011 [formerly § 1806] provides for a public interest exemption to the licensing requirement of § 2030. Section 2011 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this division any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO CCA ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, through a DMP, a CCA receives debtors' funds and thereafter distributes, or transmits, those funds to the debtors' creditors in accordance with the terms of the repayment plan. Thus, CCAs receive money for transmission within or outside the United States. Pursuant to FC § 2030, CCAs would need to obtain a license unless exempt.

B. Exemption.

As you note, CCAs meet the definition of "prorater" as defined in FC § 12002.1 of the California Proraters Law. As such, CCAs are already licensed and regulated by the California Department of Corporations. It would therefore be duplicative to require licensing of CCAs under the Money Transmission Act. Moreover, such licensing would result in CCAs being subject to two regulatory schemes and would confuse jurisdiction. Finally, CCAs' business of money transmission is incidental to its credit counseling activities.

For these reasons, there are hereby exempted from the provisions of Chapter3, Division 1.2 of the FC, as being in the public interest and the regulation of which is not necessary, the offering and providing of DMPs to California consumers by CCAs.

Sincerely,

/s/ Jennifer L.W. Rumberger

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Opinion – "Bank Issued Stored Value Card - Not Subject to Money Transmission Act"

April 18, 2011

Re: Opinion Request

Dear ____:

This responds to your letter dated April 1, 2011, in which you request a determination as to whether the proposed activities of ___ (___) would require a money transmission license under California Financial Code § 2000 et seq. [formerly § 1800]

FACTUAL BACKGROUND.

You describe the facts as follows. ___ is working with a commercial bank (Bank) to sell an FDIC insured, general purpose re-loadable, open loop stored value card that would be marketed to ___'s customers (Program). In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. ___ would sell the cards through ___ locations as authorized by the Bank. ___ would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would immediately be liable to the cardholder for the funds, and ___ would settle with the Bank on a daily basis. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) §2030(a) [formerly § 1810(a)] states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this division. . . ."

FC §2003(o)(2) [formerly § 1803(o)(2)], in relevant part, defines "money transmission" as "selling or issuing stored value."

FC §2011 [formerly § 1806] provides for a public interest exemption to the licensing requirement of §2030. Section 2011 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this division.

APPLICATION OF MONEY TRANSMISSION ACT TO ___'S ACTIVIITES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, ___ intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 2003(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), ___'s activities fall within the Money Transmission Act. Pursuant to FC §2030, ___ would need to obtain a license unless exempt.

B. Exemption.

As you note, the stored value cards that ___ intends to sell are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject ___ to two regulatory schemes, and would confuse jurisdiction.

For these reasons, there is hereby exempted from the provisions of Chapter 3, Division 1.2 of the FC, as being in the public interest and the regulation of which is not necessary, the selling of a bank-issued, FDIC insured, general purpose re-loadable, open loop stored value card in California by ___.

Sincerely,

/s/ Jennifer L.W. Rumberger

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

EXHIBIT D

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G BROWN JR., Governor
BRIAN P KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Opinion – "Bank Issued Re-loadable Stored Value Cards - Not Subject to Money Transmission Act"

June 14, 2011

Re: Opinion Request

Dear ___

This responds to your letter dated April 19, 2011, in which you requested a determination as to whether the proposed activities of ____ (____) would require a money transmission license under California Financial Code § 2000 et seq. [formerly § 1800]

FACTUAL BACKGROUND.

You describe the facts as follows. ____ serves as a program manager to federal and state charted banks who wish to offer a Visa or MasterCard branded, general purpose, reloadable debit card (Program). Specifically, in California, according to the ___ ____ Agreement (Agreement) attached to your letter of May 20, 2011, ____ will serve as the marketer of cards issued by ____ (Bank). Per the Agreement, all solicitation material used by ____ will be reviewed and approved in writing by Bank prior to its use in the marketplace. In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. ____ would sell the cards through its agent locations. ____ would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would immediately be liable to the cardholder for the funds, and ____ would settle with the Bank the next business day. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 2030(a) [formerly § 1810(a)] states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ." FC § 2003(o)(2) [formerly § 1803(o)(2)], in relevant part, defines "money transmission" as "selling or issuing stored value."

FC § 2011 [formerly § 1806] provides for a public interest exemption to the licensing requirement of § 2030. Section 2011 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public

interest and that the regulation of such persons or transactions is not necessary for the purposes of this division.

APPLICATION OF MONEY TRANSMISSION ACT TO ____'S ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, ____ intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 2003(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), ____'s activities fall within the Money Transmission Act. Pursuant to FC § 2030, ____ would need to obtain a license unless exempt.

B. Exemption.

As you note, the stored value cards that ____ intends to sell are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject ____ to two regulatory schemes, and would confuse jurisdiction.

For these reasons, the selling of a bank-issued, FDIC insured, general purpose, re-loadable, stored value card in California by ____ is considered to be in the public interest and that the regulation of this transaction is not necessary, and therefore, is hereby exempted from Chapter 3, Division 1.2 of the FC.

Sincerely,

/s/ Paul T. Crayton

PAUL T. CRAYTON
Senior Counsel

PTC:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

EXHIBIT E

11-6

June 17, 2011

VIA E-MAIL & U.S. MAIL

Re: Opinion Request

Dear __________:

This responds to your letters and various communications with the Department of Financial Institutions, in which you request a determination as to whether the proposed activities of __________ would require a money transmission license under California Financial Code § 1800 et seq.

FACTUAL BACKGROUND.

You describe the facts as follows. __________ is working with a commercial bank (Bank) to sell: (1) an FDIC insured, re-loadable, prepaid VISA stored value card with the brand name "__________" (__________ Program) and (2) a "white label" FDIC insured, re-loadable, prepaid VISA stored value card (e.g., __________ Program). __________ also may offer a mobile top-up minutes feature with the two Programs, which would enable customers to refill or top-up their mobile phones with minutes by transferring funds from their prepaid cards to their phone cards. In both proposed Programs, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. __________ would not hold any cardholder funds associated with the Programs. Cardholder funds are not included on the balance sheet of __________. All funds would be immediately loaded onto a card, and the Bank would immediately be liable to the cardholder for the funds. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

__________ would also act as a processor and program manager for the bank issuing the stored value cards.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o)(2), in relevant part, defines "money transmission" as "selling or issuing stored value."

FC § 1806 provides for a public interest exemption to the licensing requirement of FC § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO __________'S ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, __________ intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 1803(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), __________'s activities fall within the Money Transmission Act. Pursuant to FC § 1810, __________ would need to obtain a license for the selling of stored value unless exempt.

__________'s processor and program management services for the Bank and for the mobile top-up minutes feature with the two Programs would not constitute "money transmission" as that term is defined in Financial Code § 1803(o).

B. Exemption.

As you note, the stored value cards that __________ intends to sell as part of the __________ Program and the __________ Program are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject __________ to two regulatory schemes, and would confuse jurisdiction.

For these reasons, the selling of a FDIC insured, re-loadable, prepaid VISA stored value card as described in the __________ Program and the __________ Program in California by __________ is considered to be in the public interest and that the regulation of this transaction is not necessary, and therefore, is hereby exempted from Chapter 14, Division 1 of the FC.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

EXHIBIT F

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN, JR., Governor
BRIAN P KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Opinion – "Software Company that Does Not Have Possession or Control of Money – Not Subject to Money Transmission Act"

May 16, 2013

Re: ___

Dear ___:

This is in response to your letters dated July 27, 2012, and February 7, 2013, in which you asked for the Commissioner's concurrence with your stated opinion that your client, ___ (___), is not engaged in a business which is regulated by the California Money Transmission Act, Financial Code § 2000, et seq. (MTA). You furnished us with a copy of the agreement between ___ and a state chartered bank (FOB), a copy of the Terms and Conditions statement which is provided to customers, a screen shot of the internet site which the customer sees, and a sample receipt.

FACTUAL BACKGROUND

According to your letter, ___ uses proprietary software to track, service and account for gifts and other monetary transactions initiated by family members and friends (customers) for the benefit of individuals incarcerated in California county jails (Facility). Such monetary transactions are initiated by the customers through kiosks located in the various Facilities or through internet or telephone based transactions. ___ has entered into an agreement with FOB, which provides that FOB is responsible for the transmission of funds from the customer to the recipient inmate's account at the designated Facility.

When a customer initiates a transaction, funds intended by the customer for the benefit of the inmate are transferred from the customer directly to an account at FOB. Customers also receive a Terms and Conditions statement when they initiate the transaction, informing them that they are engaging in a fund transfer transaction with FOB, and a receipt naming FOB when they complete the transaction. FOB has sole custody and control of those funds and takes title to those funds until it arranges to move the funds to the individual Facility's bank account, where the Facility holds those funds in trust for the designated inmate. At no time does ___ have any ownership or control of the account or of any funds transmitted for the benefit of the inmate.

CALIFORNIA MONEY TRANSMISSION ACT

California Financial Code (FC) § 2030 (a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed is or exempt from licensure under this division or is an agent of a person licensed or exempt from licensure under this division."

FC § 2003 (o) defines "money transmission" as any of the following:

(1) "Selling or issuing payment instruments."
(2) "Selling or issuing stored value."
(3) "Receiving money for transmission."

FC § 2003 (s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 2010 (d) exempts commercial banks from the MTA.

APPLICATION OF MTA TO ___'S PRODUCTS AND SERVICES

___'s role as a provider of software does not constitute either receiving money for transmission or operating a money transmission business, as defined in the MTA. Commissioner's Opinion No. 001 provides that software application providers that only receive instructions, orders or directions to transmit money or monetary value and do not actually or constructively receive, take possession or hold any money or monetary value for transmission, and do not advertise, solicit or hold themselves out as receiving money for transmission have not received money for transmission for purposes of FC § 2003 (s). Accordingly, and based solely upon the descriptions and representations in your letters and attachments, our view is that ___ would not be deemed to be engaged in any money transmission activities in California which are regulated by the Department of Financial Institutions. Furthermore, although, there is money transmission occurring, it is being conducted by FOB, which is an exempt entity pursuant to FC § 2010 (d).

This opinion is based solely on the facts presented in your letters and the documents attached thereto, and may change if any of the conditions or circumstances under which the company provides services are altered in the future. If you have any questions or comments, please give me a call at (916) 322-5979.

Sincerely,

/s/ Tony Lehtonen

TONY LEHTONEN
Senior Counsel

TL:is
cc: Robert Venchiarutti, Deputy Commissioner, Department of Financial Institutions, San Francisco

McGuffin, Matthew@DBO

From:	Mirrashidi, Lila@DBO
Sent:	Tuesday, May 20, 2014 1:54 PM
To:	McGuffin, Matthew@DBO
Subject:	FW: Invitation for Comments under the Money Transmission Act

-----Original Message-----
From: Brown, Thomas [mailto:tombrown@paulhastings.com]
Sent: Thursday, March 27, 2014 12:49 PM
To: Mirrashidi, Lila@DBO
Subject: Re: Invitation for Comments under the Money Transmission Act

Thanks Lila

Sent from my iPad

On Mar 27, 2014, at 12:02 PM, "Mirrashidi, Lila@DBO" <Lila.Mirrashidi@dbo.ca.gov<mailto:Lila.Mirrashidi@dbo.ca.gov>> wrote:

Hi Tom, please see DBO's invitation for comment on proposed regulations under the MTA. Let me know if you didn't receive the email below, and I'll send you the link where you can add yourself to our interested parties list for regulation updates.

Lila

Lila Mirrashidi
Deputy Commissioner, Legal Division
Department of Business Oversight
916-322-8862

From: California DBO Subscriptions [mailto:CADBOSubscriptions@Service.GovDelivery.com]
Sent: Thursday, March 27, 2014 7:37 AM
To: De Young, Kristine@DBO; Cunningham, Karen@DBO; Carroll, Patrick@DBO; Golden, Alana@DBO; Constantino, Roxanna@DBO; Ruff, Rachel@DBO; Leyes, Mark@DBO; Huang, Lisa@DBO; Dela Cruz, Arlene@DBO; Fong, Karen@DBO
Subject: Courtesy Copy: Invitation for Comments under the Money Transmission Act

This is a courtesy copy of an email bulletin sent by Karen Fong.

This bulletin was sent to the following groups of people:

Subscribers of Money Transmitter Regulations, Money Transmitters - Designated Email (133 recipients)

[DBO Logo]
California Department of Business Oversight

[=============]
Invitation for Comments on Proposed Regulations

Invitation for Comments under the Money Transmission Act

The Department is requesting comments on proposed changes to regulations under the Money Transmission Act. The proposed regulations set forth requirements for a money transmitter license and money transmitters who are licensed by the Department of Business Oversight. The proposed changes under consideration include amendments to definitions, exemptions from the Money Transmission Act, application requirements for a license, administrative standards and procedures relating to an application for a license, tangible shareholders' equity, consumer disclosures, and eligible securities. Accordingly, the Department is seeking comments from interested parties and parties who would be subject to the regulations. The Invitation for Comments Notice is available at this link<http://www.dbo.ca.gov/Laws_&_Regs/Money_Transmission/Default.asp>.

The deadline to submit comments is April 26, 2014.

Please submit comments to regulations@dbo.ca.gov<mailto:regulations@dbo.ca.gov>.

[=============]

DBO California Department of Business Oversight

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****
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****

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For additional information, please visit our website at www.paulhastings.com

McGuffin, Matthew@DBO

From:	Mirrashidi, Lila@DBO
Sent:	Tuesday, May 20, 2014 1:52 PM
To:	McGuffin, Matthew@DBO
Subject:	FW: Invitation for Comments under the Money Transmission Act

---

From: Mirrashidi, Lila@DBO
Sent: Thursday, March 27, 2014 8:59 AM
To: Heidig, Elizabeth@OAL
Subject: FW: Invitation for Comments under the Money Transmission Act

Hi Elizabeth,
Nice speaking to you on Tuesday. This morning, DBO emailed proposed regs under the MTA for comment to licensees and those who have signed up to receive regulation updates. This was emailed to Mr. Greenspan at the email address from which he emails the Department (aarong@thinkcomputer.com).

If you ever have any questions, feel free to contact me.

Best,
Lila

Lila Mirrashidi
Deputy Commissioner, Legal Division
Department of Business Oversight
916-322-8862

From: California DBO Subscriptions [mailto:CADBOSubscriptions@Service.GovDelivery.com]
Sent: Thursday, March 27, 2014 7:37 AM
To: De Young, Kristine@DBO; Cunningham, Karen@DBO; Carroll, Patrick@DBO; Golden, Alana@DBO; Constantino, Roxanna@DBO; Ruff, Rachel@DBO; Leyes, Mark@DBO; Huang, Lisa@DBO; Dela Cruz, Arlene@DBO; Fong, Karen@DBO
Subject: Courtesy Copy: Invitation for Comments under the Money Transmission Act

This is a courtesy copy of an email bulletin sent by Karen Fong.

This bulletin was sent to the following groups of people:

Subscribers of Money Transmitter Regulations, Money Transmitters - Designated Email (133 recipients)

California Department of Business Oversight

Invitation for Comments on Proposed Regulations

Invitation for Comments under the Money Transmission Act

The Department is requesting comments on proposed changes to regulations under the Money Transmission Act. The proposed regulations set forth requirements for a money transmitter license and money transmitters who are licensed by the Department of Business Oversight. The proposed changes under consideration include amendments to definitions, exemptions from the Money Transmission Act, application requirements for a license, administrative standards and procedures relating to an application for a license, tangible shareholders' equity, consumer disclosures, and eligible securities. Accordingly, the Department is seeking comments from interested parties and parties who would be subject to the regulations. The Invitation for Comments Notice is available at this link.

The deadline to submit comments is **April 26, 2014**.

Please submit comments to regulations@dbo.ca.gov.

DBO California Department of Business Oversight

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STAY CONNECTED:

McGuffin, Matthew@DBO

From:	Mirrashidi, Lila@DBO
Sent:	Tuesday, May 20, 2014 1:52 PM
To:	McGuffin, Matthew@DBO
Subject:	FW: Greenspan Petition

From: Mirrashidi, Lila@DBO
Sent: Friday, January 31, 2014 1:03 PM
To: Heidig, Elizabeth@OAL
Subject: Re: Greenspan Petition

Sure!

Lila Mirrashidi

On Jan 31, 2014, at 12:59 PM, "Heidig, Elizabeth@OAL" <Elizabeth.Heidig@oal.ca.gov> wrote:

> Will do. Is now good?
>
> ---
>
> **From:** Mirrashidi, Lila@DBO [mailto:Lila.Mirrashidi@dbo.ca.gov]
> **Sent:** Friday, January 31, 2014 12:58 PM
> **To:** Heidig, Elizabeth@OAL
> **Subject:** Re: Greenspan Petition
>
> Hi Elizabeth, if you could call me on my cell that would be great. I look forward to speaking with you.
>
> Lila Mirrashidi
>
> On Jan 31, 2014, at 12:56 PM, "Heidig, Elizabeth@OAL" <Elizabeth.Heidig@oal.ca.gov> wrote:
>
>> Thank you. I will call her this afternoon.
>>
>> *Elizabeth Heidig*
>> Senior Counsel
>> Office of Administrative Law
>> 916.323.6800
>> 916.323.6826 (fax)
>> eheidig@oal.ca.gov
>>
>> ---
>>
>> **From:** McQuinn, Michael@DBO [mailto:Michael.McQuinn@dbo.ca.gov]
>> **Sent:** Friday, January 31, 2014 11:31 AM
>> **To:** Heidig, Elizabeth@OAL
>> **Cc:** Mirrashidi, Lila@DBO; Hanna, John@DBO
>> **Subject:** Greenspan Petition
>> **Importance:** High

Ms. Heidig,

It was a pleasure speaking with you this morning. After our call concluded, I spoke with Lila Mirrashidi, the Deputy Commissioner in charge of the Department's Legal Division. Deputy Commissioner Mirrashidi is responsible for overseeing the effort by Department counsel to draft regulations pursuant to the Money Transmission Act. She asked me to convey that she would be happy to discuss with you the status of her Division's progress in this area at your convenience. Deputy Commissioner Mirrashidi can be reached via phone at (916) 508-5717 (cell) and (916) 322-8862 (desk).

Please feel free to contact me with any additional questions.

Regards,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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July 23, 2013

VIA UPS

Department of Business Oversight
Division of Financial Institutions
Attention: Custodian of Records
45 Fremont Street, Suite 1700
San Francisco, CA 94105-2219

Re: California Public Records Act Request (Government Code § 6250)

Dear Sir or Madam:

Pursuant to the California Public Records Act ("CPRA"), Government Code Section 6250 *et seq.*, and Sections 250.9 and 250.9.1 of Title 10 of the California Code of Regulations, we hereby request from the Department of Business Oversight ("DBO") copies of any and all writings containing policy statements, advice and/or opinion letters, internal memoranda and other communications (both internal and external) regarding DBO's interpretation and enforcement of the Money Transmission Act, Financial Code Section 2000 *et seq.*, ("MTA") and any of the specific provisions, definitions, or standards contained therein.

There is a strong public interest supporting DBO's disclosure of the above-requested information. Over two years have passed since the California Legislature passed the MTA, and in that time, DBO has not issued a single published regulation interpreting the MTA or offering guidance about DBO's enforcement policies. DBO has recently released a limited number of its letters and memoranda issued in response to requests for advice or opinions regarding its interpretation and enforcement policies under the MTA.[1] Because this repository represents only a limited selection of DBO's written guidance, the public's interest in receiving the full scope of regulatory guidance that DBO has provided on an individual basis is manifest. *State Bd. of Equalization v. Super. Ct.*, 10 Cal. App. 4th 1177, 1185-86 (1992) ("There is a manifest public interest in the avoidance of secret law and a correlative interest in the disclosure of an agency's working law."). The public's interest in receiving and reviewing DBO's interpretive guidance, policies, and standards relating to the MTA "promotes its accountability to the public and the consistent, predictable and nonarbitrary application and enforcement of the law," which are the interests the Legislature sought to uphold in enacting the CPRA. *Id.* at 1186. *See County of Santa Clara v. Super. Ct.*, 170 Cal. App. 4th 1301, 1319-21 (2009) ("The CPRA 'was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.'") (quoting *Filarsky v. Super. Ct.*, 28 Cal. 4th 419, 425-26 (2002)).

We would be happy to coordinate with your office if pre-payment for any charges incurred in the duplication of these files is required. We look forward to receiving a written response within 10 days of DFI's receipt of this request. *See* Gov. Code § 6253(c).

Very truly yours,

Thomas P. Brown
Lecturer, School of Law, U.C. Berkeley

RECEIVED
13 JUL 24 AM 9:24
DEPARTMENT OF
BUSINESS OVERSIGHT
SAN FRANCISCO

---

[1] *See* DFI Legal Precedent System, *available at* http://www.dbo.ca.gov/Laws_&_Regs/legal_precedents_system/default.asp.

STATE OF CALIFORNIA – BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY EDMUND G. BROWN JR., Governor

DEPARTMENT OF BUSINESS OVERSIGHT

Ensuring a Fair and Secure Financial Services Marketplace for all Californians

Jan Lynn Owen
Commissioner of Business Oversight

IN REPLY REFER TO:
FILE NO: PRA 13-83

August 2, 2013

Thomas P. Brown, Esq.
919 Olmstead Street
San Francisco, California 94134

VIA CERTIFIED MAIL

RE: Public Records Act Request

Dear Mr. Brown,

The Department of Business Oversight is in receipt of your recent letter dated July 23, 2013, wherein you requested production of records pursuant to the California Public Records Act, Govt. Code § 6250 *et seq.* Your request was received via first class mail on July 24, 2013, in the Department's San Francisco office.

In your letter, you requested "copies of any and all writings containing policy statements, advice and/or opinion letters, internal memoranda and other communications (both internal and external) regarding DBO's interpretation and enforcement of the Money Transmission Act, Financial Code Section 2000 *et seq.*, ("MTA") and any of the specific provisions, definitions, definitions, or standards contained therein."

I write to notify you that, pursuant to Govt. Code § 6253, subd. (c), I am extending by 14 days the deadline for the Department to determine whether your request seeks copies of disclosable public records. This extension will move the deadline from August 3, 2013, to August 17, 2013.

Please contact me at (213) 576-7582 or John.Hanna@dbo.ca.gov should you have any questions about this extension or the Department's handling of your request. If I am not available you may contact Assistant General Counsel Michael McQuinn at (916) 322-5858 or Michael.McQuinn@dbo.ca.gov.

Sincerely,

JOHN R. HANNA
General Counsel

From:	McQuinn, Michael@DBO
Sent:	Friday, January 31, 2014 11:31 AM
To:	Heidig, Elizabeth@OAL
Cc:	Mirrashidi, Lila@DBO; Hanna, John@DBO
Subject:	Greenspan Petition
Importance:	High

Ms. Heidig,

It was a pleasure speaking with you this morning. After our call concluded, I spoke with Lila Mirrashidi, the Deputy Commissioner in charge of the Department's Legal Division. Deputy Commissioner Mirrashidi is responsible for overseeing the effort by Department counsel to draft regulations pursuant to the Money Transmission Act. She asked me to convey that she would be happy to discuss with you the status of her Division's progress in this area at your convenience. Deputy Commissioner Mirrashidi can be reached via phone at (916) 508-5717 (cell) and (916) 322-8862 (desk).

Please feel free to contact me with any additional questions.

Regards,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

From: Heidig, Elizabeth@OAL
Sent: Friday, January 31, 2014 12:56 PM
To: McQuinn, Michael@DBO
Cc: Mirrashidi, Lila@DBO; Hanna, John@DBO
Subject: RE: Greenspan Petition

Thank you. I will call her this afternoon.

Elizabeth Heidig
Senior Counsel
Office of Administrative Law
916.323.6800
916.323.6826 (fax)
eheidig@oal.ca.gov

From: McQuinn, Michael@DBO [mailto:Michael.McQuinn@dbo.ca.gov]
Sent: Friday, January 31, 2014 11:31 AM
To: Heidig, Elizabeth@OAL
Cc: Mirrashidi, Lila@DBO; Hanna, John@DBO
Subject: Greenspan Petition
Importance: High

Ms. Heidig,

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Please feel free to contact me with any additional questions.

Regards,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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From: McQuinn, Michael@DBO
Sent: Thursday, September 19, 2013 4:25 PM
To: Heidig, Elizabeth@OAL
Subject: Tom Brown Petition

Hello Elizabeth,

I tried calling a few minutes ago but was not able to reach you. I have an answer to the inquiry that you made concerning the Money Transmission Act. If you're free later this afternoon or tomorrow, please feel free to give me a call at your convenience.

Thanks,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

From:	Heidig, Elizabeth@OAL
Sent:	Thursday, September 19, 2013 5:01 PM
To:	McQuinn, Michael@DBO
Subject:	RE: Tom Brown Petition

Great. Thanks. I will call you tomorrow morning.

From: McQuinn, Michael@DBO [mailto:Michael.McQuinn@dbo.ca.gov]
Sent: Thursday, September 19, 2013 4:25 PM
To: Heidig, Elizabeth@OAL
Subject: Tom Brown Petition

Hello Elizabeth,

I tried calling a few minutes ago but was not able to reach you. I have an answer to the inquiry that you made concerning the Money Transmission Act. If you're free later this afternoon or tomorrow, please feel free to give me a call at your convenience.

Thanks,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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From: Tom Brown <tpbrown5@gmail.com>
Sent: Thursday, August 08, 2013 6:46 PM
To: McQuinn, Michael@DBO
Cc: Hanna, John@DBO
Subject: Re: Public Records Request

Mike,

Thanks for your follow-up note

I am writing to confirm that your description of our agreement limiting the scope of my public records request. For John's benefit, as I indicated, I am asking for this information in connection with the effort to prompt the development of regulations interpreting California's Money Transmission Act. Letters reflecting how the DFI and now the DBO are interpreting the Act seem like the right place to start.

I appreciate your help with this, and if there's anything that I can to further facilitate, please let me know.

Best,

Tom Brown

On Aug 8, 2013, at 11:47 AM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

Hello Tom,

I enjoyed speaking with you as well.

Per our phone conversation, I write to confirm that we have agreed to narrow the scope of your July 23, 2013, request for records in light of our discussion of the context for your making this request. I understand that the scope of your request will be limited to opinions or other guidance wherein DFI or DBO legal counsel have interpreted the California Money Transmission Act in communications with applicants, prospective applicants, or licensees.

As I explained earlier, your agreement to limit the scope of your request in no way precludes you from requesting additional records from the Department of Business Oversight at a later date.

Once I have made a determination as to whether your request seeks copies of disclosable records, I will provide you with a written response via email. Per John Hanna's letter, you will receive the Department's response no later than August 17, 2013. We have further agreed that responsive, nonexempt records will be provided to you via email in PDF format.

Should you have any questions about this message or my handling of your records request, please do not hesitate to contact me. I can be reached by email or via phone at (916) 322-5858.

Best regards,

Michael P. McQuinn

Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

-----Original Message-----
From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Thursday, August 08, 2013 10:36 AM
To: McQuinn, Michael@DBO
Subject: Public Records Request

Mike,

I enjoyed our conversation.

I look forward to working with you on my public records request and the underground regulation petition.

Please feel free to contact me at this email address, my home address (REDACTED), and my cell phone REDACTED.

Best,

Tom Brown
Lecturer Berkeley Law School

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Best,

Tom Brown
Lecturer Berkeley Law School

McQuinn, Michael@DBO

From: McQuinn, Michael@DBO
Sent: Friday, August 16, 2013 6:01 PM
To: 'Tom Brown'
Subject: RE: Public Records Request
Attachments: PRA Response.pdf; MTA Opinions & Orders_Redacted.pdf

Tom,

You will find attached the Department's response to your modified request as well as a digital copy of all records responsive to the same. Please let me know if you have any questions about either attachment.

Best regards,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Thursday, August 08, 2013 6:46 PM
To: McQuinn, Michael@DBO
Cc: Hanna, John@DBO
Subject: Re: Public Records Request

Mike,

Thanks for your follow-up note

I am writing to confirm that your description of our agreement limiting the scope of my public records request. For John's benefit, as I indicated, I am asking for this information in connection with the effort to prompt the development of regulations interpreting California's Money Transmission Act. Letters reflecting how the DFI and now the DBO are interpreting the Act seem like the right place to start.

I appreciate your help with this, and if there's anything that I can to further facilitate, please let me know.

Best,

Tom Brown

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As I explained earlier, your agreement to limit the scope of your request in no way precludes you from requesting additional records from the Department of Business Oversight at a later date.

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Should you have any questions about this message or my handling of your records request, please do not hesitate to contact me. I can be reached by email or via phone at (916) 322-5858.

Best regards,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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Sent: Thursday, August 08, 2013 10:36 AM
To: McQuinn, Michael@DBO
Subject: Public Records Request

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Please feel free to contact me at this email address, my home address (REDACTED), and my cell phone REDACTED.

Best,

Tom Brown
Lecturer Berkeley Law School

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EDMUND G. BROWN JR., Governor

DEPARTMENT OF BUSINESS OVERSIGHT

Ensuring a Fair and Secure Financial Services Marketplace for all Californians

Jan Lynn Owen
Commissioner of Business Oversight
Sacramento, California

IN REPLY REFER TO:
FILE NO: _____

August 16, 2013

VIA ELECTRONIC MAIL

Thomas P. Brown, Esq.
UC Berkeley School of Law
tpbrown5@gmail.com

RE: Public Records Act Request

Mr. Brown:

This letter follows our communication via phone and email regarding your recent request for records made pursuant to the California Public Records Act, Govt. Code § 6250 *et seq.*

Pursuant to your request, please find enclosed herewith a digital file containing copies of all interpretive opinions and orders issued by the former Department of Financial Institutions pursuant to the California Money Transmission Act, Fin. Code § 2000. There have been no interpretive opinions construing the Money Transmission Act issued by the Department of Business Oversight.

In reviewing the enclosed opinions, I have determined that certain information contained therein is exempt from disclosure. Accordingly, this information has been redacted.

I understand that representations were made to money transmitter applicants and prospective applicants that any information submitted to the Department in connection with an interpretive opinion request would be held in confidence and would not be disclosed to the public in a manner that would link the information to the company to which it pertains. A record is exempt if it is "contained in or related to . . . [i]nformation received in confidence by [the Department of Business Oversight]." Govt. Code § 6254, subd. (d), para. 4. To maintain the confidence of the parties who have disclosed business information to the Department, I have carefully redacted any information which could reasonably allow a reader to link the facts set forth therein to the entity or person submitting the request for an interpretive opinion. Information so redacted includes the following: business entities, affiliates, officers, or counsel associated with the applicant or prospective applicant.

I appreciate your patience as you have awaited our response to your request. Please do not hesitate to contact me should you have any questions about the Department's handling of this matter. I can be reached at (916) 322-5858.

Best regards,

Michael P. McQuinn
Assistant General Counsel
Department of Business Oversight

From: Tom Brown <tpbrown5@gmail.com>
Sent: Tuesday, September 03, 2013 12:42 PM
To: McQuinn, Michael@DBO
Subject: Re: Returned your call

Mike,

I got your voicemail. Let's discuss. Let me know when I might reach you.

Best,

TPB

On Sep 3, 2013, at 10:43 AM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

Hello Tom,

I am in receipt of your voicemail message from earlier this morning. I returned your call using the number you provided but was not able to leave a message. Please call me back at your earliest convenience.

Regards,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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From:	Tom Brown <tpbrown5@gmail.com>
Sent:	Tuesday, September 03, 2013 1:48 PM
To:	McQuinn, Michael@DBO
Subject:	Re: Returned your call

That works. I can give you a call.

TPB

On Sep 3, 2013, at 1:24 PM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

Tom,

Will 3 pm work for you?

Best,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Tuesday, September 03, 2013 12:42 PM
To: McQuinn, Michael@DBO
Subject: Re: Returned your call

Mike,

I got your voicemail. Let's discuss. Let me know when I might reach you.

Best,

TPB

On Sep 3, 2013, at 10:43 AM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

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Regards,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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From: Tom Brown <tpbrown5@gmail.com>
Sent: Wednesday, September 04, 2013 9:34 AM
To: McQuinn, Michael@DBO
Subject: Re: Public Records Request

Michael,

Thank you so much for providing this response. I very much appreciate your diligence.

As I mentioned in our telephone call yesterday, OAL has asked that I forward a copy of DFI's pre-filing questionnaire/checklist. I assume that it is possible to get that through the public records request as well. Please let me know if that is mistaken.

Best,

TPB

On Aug 16, 2013, at 6:01 PM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

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Best regards,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Thursday, August 08, 2013 6:46 PM
To: McQuinn, Michael@DBO
Cc: Hanna, John@DBO
Subject: Re: Public Records Request

Mike,

Thanks for your follow-up note

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Best,

Tom Brown

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Best regards,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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I look forward to working with you on my public records request and the underground regulation petition.

Please feel free to contact me at this email address, my home address (REDACTED), and my cell phone REDACTED

Best,

Tom Brown
Lecturer Berkeley Law School

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<PRA Response.pdf><MTA Opinions & Orders_Redacted.pdf>

From: McQuinn, Michael@DBO
Sent: Wednesday, September 04, 2013 11:35 AM
To: 'Tom Brown'
Subject: RE: Public Records Request

Tom,

I am writing to confirm receipt of your record request. I will be in touch with you in the next few days with the Department's response.

Best,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
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California Department of Business Oversight

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Fax: (916) 322-1559

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Lecturer Berkeley Law School

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<PRA Response.pdf><MTA Opinions & Orders_Redacted.pdf>

McQuinn, Michael@DBO

From:	McQuinn, Michael@DBO
Sent:	Thursday, September 12, 2013 11:41 AM
To:	'Tom Brown'
Subject:	RE: Public Records Request
Attachments:	Pre-File Questions DBO MTD July 2013.pdf

Hello Tom,

Please find attached the document responsive to your September 4, 2013, record request. Feel free to contact me if you require anything further.

Best,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Wednesday, September 04, 2013 9:34 AM
To: McQuinn, Michael@DBO
Subject: Re: Public Records Request

Michael,

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Pre-filing Questions
Department of Business Oversight – Money Transmitter Division[1]

1) Summary of the applicant's business plan for California activity.

2) Applicant's pro-forma balance sheet and income statement financial projections for three years (2013-2015).

3) Applicant's 2010, 2011, and 2012 Audited Financial Statements and most recent company prepared financial statement. Audited reports should be submitted for existing companies, if available. Audited reports submitted should also include all footnotes and management's responses, if applicable.

4) Executive summary about the applicant and organization chart (should include a listing of the states which the applicant has a license as an MSB, listing of states applicant is conducting MSB activity in, and all other activities being conducted by the applicant. If payment processing or MSB activity is being conducted by an affiliate or parent, please also provide details. The summary should also include a listing of directors, key officers, and indentify the compliance officer. If California bill payment or check cashing activities are being considered, please indicate if appropriate licenses are being obtained and provide contact numbers for agency reviewing the applications.

5) Copy of the applicant's most recent independent AML/BSA review and management's response.

6) Most recent risk assessment of the proposed applicant (should include a summary of all business lines, activities, and steps taken by management to measure and control risks by the applicant).

7) ADTL projections for California and projected company wide transmission activity for 2013-2015. Please indicate amounts for both domestic (includes reverse flow of funds from foreign countries into the USA) and foreign transmission activity. Also, please include projections for outstanding stored value products, payment instrument activity, and travelers check activity, if applicable.

8) Dates your CFO, compliance officer, controlling shareholder, and/or proposed manager of the California operations would be available for a pre-filing meeting in San Francisco. Once the information is reviewed we can make a final decision regarding who must attend.

---

[1] Please refer to http://www.dbo.ca.gov/Licensees/money_transmitters/default.asp for detailed instructions regarding the application process, pre-file requirements, and California Financial Code Section 2000, which governs money transmission activity in California.

From:	Tom Brown <tpbrown5@gmail.com>
Sent:	Monday, September 16, 2013 7:15 PM
To:	McQuinn, Michael@DBO
Subject:	Re: Public Records Request

Thanks Michael.

I am curious if you might time to talk on Thursday or Friday. I want to follow-up on a thought that was prompted by AB 786. Thursday from 3 to 4 is a good window for me.

Best,

TPB

On Sep 12, 2013, at 11:43 AM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:

Hello Tom,

Please find attached the document responsive to your September 4, 2013, record request. Feel free to contact me if you require anything further.

Best,

Michael P. McQuinn
Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
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Assistant General Counsel

From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Thursday, August 08, 2013 6:46 PM
To: McQuinn, Michael@DBO
Cc: Hanna, John@DBO
Subject: Re: Public Records Request

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California Department of Business Oversight

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<Pre-File Questions DBO MTD July 2013.pdf>

From: Tom Brown <tpbrown5@gmail.com>
Sent: Friday, September 20, 2013 10:36 AM
To: Heidig, Elizabeth@OAL
Cc: McQuinn, Michael@DBO
Subject: OAL Petition

Elizabeth,

I hope all is well.

I am writing to confirm that I am withdrawing my petition related to underground regulation at the Department of Business Oversight. Based on our conversations and parallel conversations with Mr. McQuinn, I believe that the development of regulations related to the California Money Transmission Act is a high priority for Department. Indeed, Mr. McQuinn has graciously extended an invitation to sit down with him and other members of the Department to discuss the issue.

I want to extend my heartfelt thanks to you and Mr. McQuinn for your hard work on this issue.

Best,

Thomas P. Brown
Lecturer, UC Berkeley Law School

Sent from my iPhone

STATE OF CALIFORNIA - GOVERNMENT OPERATIONS AGENCY
EDMUND G. BROWN, Jr., Governor

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Director

September 23, 2013

Mr. Thomas P. Brown
REDACTED

Re: CTU2013-0724-01

Dear Mr. Brown:

On July 24, 2013, the Office of Administrative Law (OAL) received your petition alleging that the Department of Business Oversight has issued, used, enforced, or attempted to enforce underground regulations. On September 20, 2013, OAL received your request for withdrawal of the petition. OAL accepts your withdrawal and will take no further action on this matter. The Department of Business Oversight indicates that it is their goal to begin the rulemaking to adopt regulations concerning the Money Transmissions Act (Fin. Code, sec. 2000, et seq.) pursuant to the Administrative Procedure Act (commencing with sec. 11340 of the Gov. Code) by the end of this year.

Nothing in our decision restricts your right or ability to pursue this matter further in the future.

Sincerely,
Elizabeth A. Heidig

Elizabeth A. Heidig
Senior Counsel

Copy: Michael McQuinn, Assistant General Counsel
Robert Venchiarutti, Deputy Commissioner
Lila Mirrashida, Deputy Commissioner

OF ADMINISTRATI.VE LAW
:APITOL MALL, SUITE 1250
MENTO, CALIFORNIA 95814

HASLER
017H15524251
$0.46⁰
09/23/2013
Mailed From 95814
US POSTAGE

Michael McQuinn, Assistant General Counsel
Department of Business Oversight
1515 K Street, Ste. 200
Sacramento, California 95814

9581440525O

From: Brown, Thomas <tombrown@paulhastings.com>
Sent: Monday, October 07, 2013 11:01 AM
To: McQuinn, Michael@DBO
Subject: Following up

Mike,

I hope all is well. I'm reaching out to try and schedule the meeting that you had offered. Curious if you might have time to talk today or tomorrow.

TPB

Sent from my iPhone

****

IRS Circular 230 Disclosure: As required by U.S.Treasury Regulations governing tax practice, you are hereby advised that any written tax advice contained herein was not written or intended to be used (and cannot be used) by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code.

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For additional information, please visit our website at www.paulhastings.com

From: Brown, Thomas <tombrown@paulhastings.com>
Sent: Monday, October 07, 2013 5:24 PM
To: McQuinn, Michael@DBO
Subject: Re: Following up

Mike,

My apologies, but my day got away from me. Is there a window tomorrow or later this week?

TPB

Sent from my iPad

> On Oct 7, 2013, at 11:33 AM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov> wrote:
>
> Hi Tom,
>
> How does 3 pm this afternoon sound?
>
> Michael P. McQuinn
> Assistant General Counsel
>
> -----Original Message-----
> From: Brown, Thomas [mailto:tombrown@paulhastings.com]
> Sent: Monday, October 07, 2013 11:01 AM
> To: McQuinn, Michael@DBO
> Subject: Following up
>
> Mike,
>
> I hope all is well. I'm reaching out to try and schedule the meeting that you had offered. Curious if you might have time to talk today or tomorrow.
>
> TPB
>
> Sent from my iPhone
>
> **
> *********************** IRS Circular 230 Disclosure: As required by
> U.S.Treasury Regulations governing tax practice, you are hereby advised that any written tax advice contained herein was not written or intended to be used (and cannot be used) by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code.
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> ***********************
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>
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For additional information, please visit our website at www.paulhastings.com

McQuinn, Michael@DBO

From: McQuinn, Michael@DBO
Sent: Tuesday, October 08, 2013 5:35 PM
To: Brown, Thomas (tombrown@paulhastings.com)
Subject: Regulatory Ombudsperson

Tom,

Per our conversation, you can find more information about the regulatory ombudsperson process in former Department of Corporations Release 16-G (Revised). Release 16-G is available in PDF format here.

Best,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

State of California
Business, Transportation and Housing Agency
DEPARTMENT OF CORPORATIONS
Supporting a Fair and Secure Financial Services Marketplace for all Californians

www.corp.ca.gov

Edmund G. Brown Jr.
Governor

Jan Lynn Owen
California Corporations Commissioner

DATE: May 14, 2013

RELEASE No. 16-G (Revised)

REGULATORY OMBUDSPERSON

This Release supersedes previous versions of Release 16-G, and provides an update of the Regulatory Ombudsperson of the Department of Corporations ("Department").

The Department's General Counsel serves as the Regulatory Ombudsperson, to help resolve complaints concerning the manner in which administrative regulations are applied to applications filed with the Department. The General Counsel may utilize attorneys from the Department to assist in performing the duties of Regulatory Ombudsperson.

If an applicant for a license, permit or registration disagrees with the manner in which an administrative regulation is being applied to the application the applicant may initiate the Regulatory Ombudsman process.

An applicant may not utilize the Regulatory Ombudsperson process for Department personnel decisions including which Department staff to assign to the application.

The applicant must first attempt to resolve the matter with the reviewing staff and if unsuccessful in that attempt, raise the issue with the reviewing staff member's supervisor. If the applicant is unable to resolve the matter with the supervisor the applicant must then convey the complaint to the final level of program review, the Deputy Commissioner of the division responsible for approving the application.

If an applicant is still not satisfied with the resolution provided by all the appropriate levels of program review, the applicant may submit the matter in writing to the Regulatory Ombudsperson. The submission should be emailed to john.hanna@corp.ca.gov and should be sent no more than 30 days after the Deputy Commissioner has informed the applicant of the Department's position after his or her review. A written request may also be made by sending the written complaint to:

Department of Corporations
Office of the General Counsel
Attention: Regulatory Ombudsman
1515 K Street, Suite 200
Sacramento, CA 95814

The written submission should include a full description of the issues in dispute; supporting information provided to the Department staff; any new information not previously provided to the Department and the reasons for not having presented it; the applicants view on how the administrative regulation should be applied to the pending application and the reasons why the regulation should be applied in the manner the applicant suggests; a summary of efforts to resolve the dispute; and a statement that the applicant's board of directors or principal(s) have authorized bringing the matter before the Regulatory Ombudsman.

The Regulatory Ombudsman may decline to consider the complaint, may consider only the written submission and any response from the Department Division that handled the matter, or may request the applicant's counsel or representative along with a Department representative appear personally or telephonically to discuss the matter. The Regulatory Ombudsman will issue a written decision within 60 business days from the date of receipt of the written complaint or personal or telephonic appearance by the applicant's counsel or representative, whichever occurs later. The Regulatory Ombudsman can extend both the time to receive the original request from the applicant as well as the time to render a written decision with notification to the applicant by email.

The decision of the Regulatory Ombudsman is final. No further efforts to register a complaint will be accepted.

The Regulatory Ombudsman process does not relieve an applicant from complying with Department decisions and actions during the complaint process. The filing of a complaint will not prevent the Department from pursuing an enforcement action or referring a matter to another agency.

The Regulatory Ombudsman policy is not intended nor should it be construed to (a) create or confer upon any person or entity any substantive or procedural rights or defenses that are enforceable in any matter, (b) restrict or limit in any way the Department's discretion in any of its actions or (c) constitute an interpretation of law.

Jan Lynn Owen
California Corporations Commissioner

By ______________________________
John R. Hanna

General Counsel

From: Brown, Thomas <tombrown@paulhastings.com>
Sent: Monday, October 14, 2013 3:15 PM
To: McQuinn, Michael@DBO
Subject: RE: Regulatory Ombudsperson

Mike,

Thanks so much for sending this. It's exactly what I needed to know.

I have another DBO organizational question for you. We've been fielding questions about California's Internet Escrow Agent statute, and we're curious who within DBO is responsible for dispensing those licenses.

Happy to discuss if that would be more convenient.

Best,

PAUL
HASTINGS

Thomas Brown | Attorney
Paul Hastings LLP | 55 Second Street, Twenty-Fourth Floor, San Francisco, CA 94105 |
Direct: +1.415.856.7248 |
Mobile: +1.415.225.1277 | Fax: +1.415.856.7348 | tombrown@paulhastings.com |
www.paulhastings.com

From: McQuinn, Michael@DBO [mailto:Michael.McQuinn@dbo.ca.gov]
Sent: Tuesday, October 08, 2013 5:36 PM
To: Brown, Thomas
Subject: Regulatory Ombudsperson

Tom,

Per our conversation, you can find more information about the regulatory ombudsperson process in former Department of Corporations Release 16-G (Revised). Release 16-G is available in PDF format here.

Best,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

Effective July 1, 2013, the Department of Corporations and the Department of Financial Institutions merged to form the Department of Business Oversight in accordance with the Governor's reorganization of state departments to provide services more efficiently and effectively.

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For additional information, please visit our website at

From: McQuinn, Michael@DBO
Sent: Monday, October 14, 2013 4:37 PM
To: 'Brown, Thomas'
Subject: RE: Regulatory Ombudsperson

Hi Tom,

The Financial Services Division, Escrow Law Unit administers Division 6 of the Financial Code, which I understand covers internet escrow agents. The Escrow Law Unit is supervised by Special Administrator Kathleen Partin. If you or a client have a question concerning licensure under the Escrow Law, Ms. Partin would be the most appropriate point of contact. She can be reached at (213) 576-7595 or via email at Kathleen.Partin@dbo.ca.gov.

Michael P. McQuinn
Assistant General Counsel

From: Brown, Thomas [mailto:tombrown@paulhastings.com]
Sent: Monday, October 14, 2013 3:15 PM
To: McQuinn, Michael@DBO
Subject: RE: Regulatory Ombudsperson

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Sent: Monday, October 14, 2013 5:15 PM
To: McQuinn, Michael@DBO
Subject: RE: Regulatory Ombudsperson

Thanks Mike.

Best,

Thomas Brown | Attorney
Paul Hastings LLP | 55 Second Street, Twenty-Fourth Floor, San Francisco, CA 94105 | Direct: +1.415.856.7248 |
Mobile: +1.415.225.1277 | Fax: +1.415.856.7348 | tombrown@paulhastings.com |
www.paulhastings.com

From: McQuinn, Michael@DBO [mailto:Michael.McQuinn@dbo.ca.gov]
Sent: Monday, October 14, 2013 4:38 PM
To: Brown, Thomas
Subject: RE: Regulatory Ombudsperson

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Michael P. McQuinn
Assistant General Counsel

From: Brown, Thomas [mailto:tombrown@paulhastings.com]
Sent: Monday, October 14, 2013 3:15 PM
To: McQuinn, Michael@DBO
Subject: RE: Regulatory Ombudsperson

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Mobile: +1.415.225.1277 | Fax: +1.415.856.7348 | tombrown@paulhastings.com |
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Sent: Tuesday, October 08, 2013 5:36 PM
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Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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From: Brown, Thomas <tombrown@paulhastings.com>
Sent: Tuesday, October 29, 2013 7:45 PM
To: McQuinn, Michael@DBO
Subject: Re: Meeting

Mike,

That works.

TPB

Sent from my iPad

On Oct 28, 2013, at 5:22 PM, "McQuinn, Michael@DBO" <Michael.McQuinn@dbo.ca.gov<mailto:Michael.McQuinn@dbo.ca.gov>> wrote:

Hello Tom,

I'm writing to confirm that you will be available to come to Sacramento on the afternoon of Wednesday, December 4, to discuss the Department's anticipated issuance of regulations pursuant to the Money Transmission Act. If not, please provide me with an alternate date at your earliest convenience.

Best,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

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For additional information, please visit our website at www.paulhastings.com

McGuffin, Matthew@DBO

From: Brown, Thomas <tombrown@paulhastings.com>
Sent: Tuesday, December 03, 2013 3:25 PM
To: McQuinn, Michael@DBO
Subject: Returning your call

Do you have time to talk at 4:30 or so?

PAUL
HASTINGS

Thomas Brown | Attorney
Paul Hastings LLP | 55 Second Street, Twenty-Fourth Floor, San Francisco, CA 94105 |
Direct: +1.415.856.7248 |
Mobile: +1.415.225.1277 | Fax: +1.415.856.7348 | tombrown@paulhastings.com |
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For additional information, please visit our website at

From: McQuinn, Michael@DBO
Sent: Tuesday, December 03, 2013 3:29 PM
To: Brown, Thomas
Subject: RE: Returning your call

Hi Tom,

Yes I do. Looking forward to your call at 4:30.

Mike

Michael P. McQuinn
Assistant General Counsel

From: Brown, Thomas [mailto:tombrown@paulhastings.com]
Sent: Tuesday, December 03, 2013 3:25 PM
To: McQuinn, Michael@DBO
Subject: Returning your call

Do you have time to talk at 4:30 or so?

PAUL
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From: McQuinn, Michael@DBO
Sent: Tuesday, December 03, 2013 5:17 PM
To: Brown, Thomas (tombrown@paulhastings.com)
Subject: Meeting Tomorrow

Hi Tom,

Per our conversation, the Department's Sacramento office is located at 1515 K Street in Sacramento. Our building is located on the northeast corner of the intersection of K and 15th Streets. Parking is available in either of the two garages that are directly across the street from the office.

Once you arrive, please go to the Department's reception area on the 2nd Floor. Then follow the directions to the Reception Area on the placard affixed to the wall which will be on your immediate left upon exiting the elevator. Once you get to Reception, please ask for me and I will come down to meet you.

See you tomorrow.

Best,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

From: Tom Brown <tpbrown5@gmail.com>
Sent: Thursday, December 05, 2013 9:50 AM
To: McQuinn, Michael@DBO
Subject: Thanks

Michael,

Thanks so much for setting up yesterday's meeting. I hope that you and your colleagues found it useful.

If you have moment at some point, I would love a reminder of who attended on your side.

Best,

TPB

McQuinn, Michael@DBO

Subject:	Tom Brown Meeting
Location:	Sacramento / Exec Conference Room (5th Floor)
Start:	Wed 12/4/2013 1:00 PM
End:	Wed 12/4/2013 2:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	McQuinn, Michael@DBO
Required Attendees:	Hanna, John@DBO (John.Hanna@dbo.ca.gov); Venchiarutti, Robert@DBO; Mirrashidi, Lila@DBO; Brown, Thomas (tombrown@paulhastings.com)

From: McQuinn, Michael@DBO
Sent: Friday, December 06, 2013 12:42 PM
To: Tom Brown
Subject: RE: Thanks

Hello Tom,

Thanks again for coming to Sacramento to meet with us. We will certainly keep the major issues that you identified in mind as we work to promulgate regulations under the MTA. It is our hope that we can continue this dialogue with you, in addition to others similarly situated, as this process begins to moves forward.

In response to your inquiry about those present at the meeting, the individuals who attended were the following:

In person

1. Lila Mirrashidi, Deputy Commissioner, Law and Policy Division;
2. Robert Venchiarutti, Deputy Commissioner, Money Transmitter Division;
3. Michael McQuinn, Assistant General Counsel, Office of the General Counsel.

Via telephone

4. Tara Murphy, Assistant General Counsel, DFI Legal Unit;
5. Jennifer Rumberger, Senior Financial Institutions Counsel, DFI Legal Unit;
6. Paul Crayton, Senior Financial Institutions Counsel, DFI Legal Unit.

(Although she and I were appointed to the same title, Ms. Murphy has a much different role in the Department. Ms. Murphy leads the Division of Financial Institutions Legal Unit, which is comprised of all of the former DFI's in-house counsel, and she reports directly to Deputy Commissioner Mirrashidi. Ms. Rumberger and Mr. Crayton both report to Ms. Murphy.)

Please feel free to follow up with me if you have any additional thoughts on the rulemaking process or the MTA generally.

Best,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel

-----Original Message-----
From: Tom Brown [mailto:tpbrown5@gmail.com]
Sent: Thursday, December 05, 2013 9:50 AM
To: McQuinn, Michael@DBO
Subject: Thanks

Michael,

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Best,

TPB

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

COMMISSIONER'S OPINION – No. 001

Companies That Do Not Receive Money For Transmission

This Opinion provides guidance on the definition of "receiving money for transmission" set forth in Financial Code (FC) § 2003(s), Division 1.2 of the FC (commencing with FC § 2000), the Money Transmission Act, in the context of companies or other persons that do not actually or constructively receive, take custody or possession, or otherwise hold any money or monetary value for transmission and do not advertise, solicit or hold themselves out as providing money transmission in this state.

FC § 2003(s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means." This means that in order to meet the definition in FC § 2003(s), a person (as defined in FC § 2003(r)) must receive money (as defined in FC § 2003(n)) or monetary value (as defined in FC § 2003(m)). Merely receiving instructions, orders or directions to transmit money or monetary value is not the equivalent of receiving money or monetary value.

Therefore, if a company or other person only receives instructions, orders or directions to transmit funds, but does not actually or constructively receive, take possession or custody, or otherwise hold any money or monetary value for transmission, that company or other person has not received money for transmission for purposes of FC § 2003(s). Examples include, but are not limited to: (1) payroll processing companies, (2) providers of electronic communications services or communication devices and (3) software application providers; provided that the companies and other persons in (1), (2) and (3) only receive instructions, orders or directions to transmit money or monetary value and do not actually or constructively receive, take possession or hold any money or monetary value for transmission, and do not advertise, solicit or hold themselves out as providing money transmission in this state.

March 28, 2013

Teveia Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS. TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

COMMISSIONER'S OPINION – No. 002

Disclosure requirements for persons that advertise, solicit or hold themselves out as providing money transmission in this state and who are not licensees, exempt from licensure, or agents of licensees or exempt entities

This Opinion provides guidance on disclosure requirements for persons who advertise, solicit, or hold themselves out as providing money transmission in this state. Financial Code (FC) § 2030(a), Division 1.2 of the FC (commencing with FC § 2000), the Money Transmission Act, provides: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this division or is an agent of a person licensed or exempt from licensure under this division." This means that only a licensed or exempt person (or an agent of such a person) can engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state. A person (other than a licensed or exempt person, or an agent of such a person) shall not advertise that it is providing money transmission in this state or solicit money transmission for itself in this state. FC 2030(a) also prohibits a person from advertising for or soliciting money transmission on behalf of a person that is not licensed or not an exempt person, or an agent of such a person. FC 2030(a), however, does not prohibit a person from advertising or soliciting money transmission on behalf of licensed or exempt persons or agents of such persons as long as the advertisement or solicitation is unambiguous as to the identity of the money transmission provider and the provider is a licensed or exempt person or agent thereof.

Thus, in order to be in compliance with FC § 2030(a), a person, whether or not the person is itself a licensed or exempt person or agent thereof, who advertises or solicits money transmission in this state on behalf of another person, may only do so on behalf of licensed (or exempt) money transmitters or their agents and must provide a disclosure in the person's advertising or solicitation materials that identifies: (1) the licensee(s), (2) the exempt person(s), or (3) the agent(s) and the licensee(s) or exempt person(s) that are their principals, as the entity(s) providing the money transmission. Examples of advertising materials, solicitations or other efforts to hold oneself out as providing money transmission that require such a disclosure include, but not are limited to: printed documents, website, emails, or display on electronic communication devices.

This Opinion also provides guidance on the definition of "agent" set forth in FC § 2003(b). The term "agent" is defined as a person (as defined in FC § 2003(r)) that "provides money transmission in California on behalf of the licensee, provided that the licensee becomes liable for the money transmission from the time money or monetary value is received by that person." This means that in order to meet the definition in FC § 2003(b), a person must receive money or monetary value. Therefore, a person, who merely advertises or solicits money transmission on behalf of a licensee, but who does not receive money or monetary value, does not meet the definition of an "agent."

Dated: April 18, 2013.

Teveia Barnes
TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
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Commissioner's Opinion – No. 003

Compliance with Financial Code § 2102(b) for electronic money transmission receipts.

This Opinion provides guidance on compliance with Financial Code (FC) § 2102(b) for receipts that are: (1) only delivered electronically to customers and (2) for transactions involving receiving money for transmission. Electronic receipts are generally permissible for transactions that are initiated electronically or in which a customer agrees to receive an electronic receipt.

FC § 2102(b) states:

> In the case of money received for transmission, a receipt shall be provided by a licensee or its agent to all customers which shall be made available to the customer in English and in the language principally used by that licensee or that agent to advertise, solicit, or negotiate, either orally or in writing, at that branch office if other than English. The receipt shall either include or have attached a conspicuous statement in English and in the language principally used by the licensee or that agent to advertise, solicit, or negotiate, either orally or in writing at that branch office if other than English in a size equal to at least 10 point bold type, as follows:
>
> RIGHT TO REFUND
> "You, the customer, are entitled to a refund of the money to be transmitted as the result of this agreement if _____ (name of licensee) does not forward the money received from you within 10 days of the date of its receipt, or does not give instructions committing an equivalent amount of money to the person designated by you within 10 days of the date of the receipt of the funds from you unless otherwise instructed by you.
>
> If your instructions as to when the moneys shall be forwarded or transmitted are not complied with and the money has not yet been forwarded or transmitted, you have a right to a refund of your money.
>
> If you want a refund. you must mail or deliver your written request to _____ (name of licensee) at _____ (mailing address of licensee). If you do not receive your refund, you may be entitled to your money back plus a penalty of up to $1,000 and attorney's fees pursuant to Section 2102 of the California Financial Code."

For transactions where only an electronic receipt is delivered to a customer for money received for transmission, licensees must still comply with the requirements of FC § 2102(b). However, notwithstanding how the electronic receipt may appear on the electronic device on which it is received by the customer, it is the opinion of the Commissioner that electronic receipts delivered by licensees to its customers are in compliance with the requirement of FC § 2102(b) that the Right to Refund statement be provided in the 10 point bold type if the following requirements are met:

1. The certified receipt filed by the licensee with the Commissioner pursuant to FC § 2100 for DFI approval/non-objection (DFI Approved) is approved by DFI and includes the following:

    (a) A hardcopy of the certified receipt that is in the required format (i.e., 10 point bold type for Right to Refund statement) and contains all required information set forth in FC § 2103; and

    (b) DFI has received a written representation either as a part of the certification of the receipt or as a separate representation signed by an authorized person of the licensee stating:

        i. "(Name of licensee) hereby represents that it is possible for its customers to print the attached electronic receipt with the Right to Refund statement in a size equal to at least ten point bold type pursuant to Financial Code § 2102."

        ii. The primary method(s) of delivering electronic receipts to the licensee's customers.

        iii. The method(s) available to customers to print the Right to Refund language in the electronic receipt in a size equal to at least 10 point bold type as otherwise required by FC § 2102(b).

2. The licensee, at the time the customer authorizes payment for the transmission, actually transmits to the customer a DFI Approved receipt, which may be in an electronic format.

Dated: May 28, 2013

Teveia Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Commissioner's Opinion – No. 004

Sale and/or distribution of gift cards that are only redeemable by the issuer for goods or services provided by the issuer or its affiliate.

This Opinion provides guidance on the definition of "selling . . . of stored value" set forth in Financial Code (FC) § 2003(o), Division 1.2 of the FC (commencing with FC § 2000), the Money Transmission Act (MTA), in the context of selling gift cards that are only redeemable by the issuer for goods or services provided by the issuer or its affiliate.

FC § 2030(a) provides in relevant part: "A person shall not engage in the business of money transmission in this state . . . unless the person is licensed or exempt from licensure . . . ."

FC § 2003(o) defines "money transmission" to mean, among other things, "selling or issuing stored value."

In defining "stored value," FC § 2003(v) states that the term "stored value" does not include, among other things, "any stored value that is only redeemable by the issuer for goods or services provided by the issuer or its affiliate, except to the extent required by applicable law to be redeemable in cash for its cash value." ("closed loop"). Closed loop stored value is not money transmission under the MTA.

Therefore, the sale or distribution of gift cards, e-cards and other similar closed loop stored value products that are only redeemable by the issuer for goods or services provided by the issuer or its affiliate is not the sale of "stored value" as that term is defined in FC § 2003(v). Accordingly, the sale of such gift cards, e-cards and other similar closed loop stored value products does not meet the definition of "money transmission" as that term is defined in FC § 2003(o). Such sales are therefore not subject to licensing under FC § 2030(a).

Dated: May 28, 2013

Teveia R Barnes
TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Commissioner's Opinion – No. 005

Compliance with the Notice Requirements in Branches of Financial Code § 2104 and Financial Code § 2105.

This Opinion provides guidance on the notices required to be posted by Financial Code (FC) § 2104 and Financial Code § 2105.

FC § 2104 provides that:

> Each licensee or agent shall prominently post on the premises of each branch office that issues or sells payment instruments, and at machines located in this state and operated by the licensee or agent that issues or sells payment instruments, a notice clearly stating that payment instruments are not insured by the federal government, the state government, or any other public or private entity. This notice shall be printed in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, with respect to the purchase of payment instruments. The information required in this notice shall be clear, legible, and in letters not less than one-half inch in height. The notice shall be posted in a conspicuous location in the unobstructed view of the public within the premises. The licensee shall provide to each of its agents the notice required by this section. In those locations operated by an agent, the agent, not the licensee, shall be responsible for the failure to properly post the required notice.

FC § 2105 provides that:

> (a) Each licensee or agent shall prominently post on the premises of each branch office that conducts money transmission a notice stating that: "If you have complaints with respect to any aspect of the money transmission activities conducted at this location, you may contact the California Department of Financial Institutions at its toll-free telephone number, 1-800-622-0620, by e-mail at consumer.complaint@dfi.ca.gov, or by mail at Department of Financial Institutions, Consumer Services, 1810 13th Street, Sacramento, CA 95811."
>
> (b) The commissioner may by order or regulation modify the content of the notice required by this section. This notice shall be printed in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate either orally or in writing, with respect to money transmission at that branch office. The information required in this notice shall be clear, legible, and in letters not less than one-half inch in height. The notice shall be posted in a conspicuous location in the unobstructed view of the public within the premises. The licensee shall provide to each of its agents the notice required by this section. In those locations operated by an agent, the agent, and not the licensee, shall be responsible for the failure to properly post the required notice.

The notice required by FC § 2104 is clearly intended to warn customers that the payment instruments that they are purchasing are not insured. The intent of the notice required by FC § 2105 is equally clearly – to provide customers with information about the complaint process available to them at the California Department of Financial Institutions. Both FC § 2104 and FC § 2105 require that the notice be "posted in a conspicuous location in the unobstructed view of the public within the premises." It is evident that the notices required by FC § 2104 and FC § 2105 will only serve their intended purpose if they are posted where there are customers to see them.

Accordingly, it is the opinion of the Commissioner that:

(a) The notice required by FC § 2104 only applies to branch offices, as defined by FC § 2003(e), and machines located in this state and operated by the licensee or agent, that issue or sell payment instruments to customers who are physically on the premises of the branch offices or physically on the premises where the machines are located; and,

(b) The notice required by FC § 2105 only applies to branch offices that conduct money transmission with customers who are physically in the branch offices.

May 28, 2013

Teveia R Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Order from the California Commissioner of Financial Institutions

Exemption from Money Transmission Act – Credit Counseling Agencies Financial Code § 2011

California Financial Code § 2011 authorizes the Commissioner of Financial Institutions (Commissioner) to exempt from Division 1.2 of the Financial Code (commencing with Financial Code § 2000), the Money Transmission Act (MTA), by order, unconditionally or upon specified terms and conditions or for specified periods, any person or transaction or class of persons or transactions, if the Commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of the MTA.

Pursuant to Financial Code § 2011, the Commissioner hereby exempts from Financial Code § 2030(a) a person engaged in the business of offering and providing debt management plans and debt settlement plans (as defined in Financial Code § 12104(c) of the Check Sellers, Bill Payers and Proraters Law (commencing with Financial Code §12000) (CA Proraters Law) provided that person is: (1) a nonprofit community service organization that meets all of the criteria in Financial Code § 12104 of the CA Proraters Law; or (2) a credit counseling agency that is duly licensed under the CA Proraters Law as a "prorater," as defined by Financial Code § 12002.1, and is supervised by the California Department of Corporations or any successor thereof as provided by law in the State of California. The Commissioner finds such action to be in the public interest and that the regulation of such transactions is not necessary for the purposes of Division 1.2 of the Financial Code.

This Order is effective immediately and shall remain in effect until revoked, amended, superseded, suspended, or supplemented by further order of the Commissioner.

Dated: March 28, 2013

Teveia Barnes
TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

Order of Exemption (Order)
California Commissioner of Financial Institutions

Exemption from Money Transmission Act – Persons Located in California But Providing Money Transmission Services Solely Outside of California

California Financial Code (FC) § 2011 authorizes the Commissioner of Financial Institutions (Commissioner) to exempt from Division 1.2 of the California Financial Code (commencing with Financial Code § 2000), the Money Transmission Act (MTA), by order, unconditionally or upon specified terms and conditions, any person or transaction or class of persons or transactions, if the Commissioner finds such person or transaction to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of the MTA. The MTA is intended pursuant to FC § 2002 to protect the interests of persons in this state who use money transmission services, to provide for the safe and sound conduct of the business of licensees and to maintain public confidence in licensees.

Pursuant to FC § 2011, the Commissioner hereby exempts a corporation or limited liability company that meets the requirements of FC § 2031 and has , one or more offices or other places of business or operations within California (Exempt Person) from compliance with FC § 2030; provided all of the following conditions are satisfied in full:

1. The Exempt Person does not engage in the business of money transmission, as defined by FC § 2003(o), with, to, or from any person, including any consumer or merchant, physically located in California.

2. The Exempt Person does not advertise, solicit or hold itself out as providing money transmission with, to, or from any person, including any consumer or merchant, physically located in California.

3. The Exempt Person prominently discloses in advertisements, web sites, mobile device applications and similar communications devices that it is not authorized to engage in the business of money transmission with, to, or from, nor to advertise, solicit or hold itself out as providing money transmission with, to, or from, any person, including any consumer or merchant, physically located in California.

4. The Exempt Person is in full compliance with the money transmission laws, if any, of all jurisdictions outside California, including all federal, state and foreign laws, applicable to its money transmission business and to its advertisements, solicitations, or other means of holding itself out as engaging in the business of money transmission.

5. The Exempt Person is duly formed in accordance with the laws of the jurisdiction of its formation. The Exempt Person is in good standing in California.

6. The Exempt Person files with the Commissioner a written statement signed under penalty of perjury of the laws of the State of California stating:

   a. The Exempt Person will engage in the business of money transmission only with persons physically located outside of California pursuant to the exemption provided by this Order.
   b. The name of the Exempt Person engaged in the business of money transmission, including any dba.
   c. The address of the Exempt Person's principal place of business, and, if different, its principle place of business in California.
   d. The address of each location in all states (other than California) and foreign jurisdictions where the Exempt Person will conduct money transmission business, including through agents, and/or all states and foreign jurisdictions in which the Exempt Person will advertise, solicit, or hold itself out as providing money transmission services.
   e. Whether the Exempt Person is a corporation or limited liability company, and its jurisdiction of formation.
   f. The names and addresses of (i) the Exempt Person's chief executive officer and chief financial officer, or the equivalents, (ii) each person, if any, that is in control, as defined by FC § 1250, of the Exempt Person, and (iii) each member of the Exempt Person's board of directors or its managing members.
   g. The first date on which the Exempt Person will commence engaging in the business of money transmission, and will advertise, solicit or hold itself out as providing money transmission outside of California for each state and/or foreign jurisdiction listed in item 6.d.
   h. Confirmation that the Exempt Person is in full compliance with the conditions in paragraphs 1 through 6 of this Order and will comply with the conditions in paragraphs 7 and 8.
   i. Any other information that may be requested by the Commissioner.
   j. The date that the Exempt Person is in full compliance with the terms and conditions in paragraph 1 through 6 of this Order (Effective Date).

7. If at any time after the Effective Date any of the information in the statement filed with the Commissioner pursuant to paragraph 6 has changed, the Exempt Person shall file with the Commissioner within thirty (30) days of such change a written statement signed under penalty of perjury of the laws of the State of California of such change.

8. The Exempt Person files with the Commissioner an application substantially in compliance with the requirements of FC § 2032 and pays the fee required by FC § 2038 for a money transmission license to the California Department of Financial Institution

(DFI) or the California Department of Business Oversight (successor to DFI) within twelve (12) months after the Effective Date.

The exemption under this Order shall remain effective and available for the Exempt Person filing the written statement required by paragraph 6 of this Order only for the twelve (12) months on and after the Effective Date and only so long as the Exempt Person is in compliance with the terms and conditions of this Order (Exemption Period). The Commissioner may by order withhold the availability to any person of the exemption provided by this Order.

The Commissioner has determined that this Order is in the public interest and that during the Exemption Period, the regulation of the Exempt Persons described herein and who are in compliance with the conditions described herein is not necessary for the purposes of the MTA. The exemption available under this Order during the Exemption Period does not apply to any person described herein who is not in compliance with the terms and conditions of this Order and the regulation of such person will be necessary for the purposes of the MTA. This Order does not affect any other exemption that may be available under the MTA.

May 28, 2013

Teveia Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
DEPARTMENT OF FINANCIAL INSTITUTIONS

In the Matter of

ALL LICENSEES UNDER THE
MONEY TRANSMISSION ACT

ORDER DECLARING ACH, CREDIT AND DEBIT CARD RECEIVABLES AS ELIGIBLE SECURITIES

DEFINITIONS

1. "Money transmission" has the meaning defined in Financial Code (FC) § 2003(o).

2. "Automated Clearing House (ACH) Receivables" are amounts debited from a customer's depository account or ACH credits initiated by the customer through the ACH, which are used to fund, purchase or pay for money transmission products and services.

3. "Debit Card Receivables" and "Credit Card Receivables" are amounts due from issuers of debit cards and credit cards, respectively, which are used to fund, purchase or pay for money transmission products and services.

FINDINGS

1. The Commissioner of Financial Institutions (Commissioner) finds that a) ACH Receivables due from U.S. national or state-chartered depository institutions and b) Debit Card Receivables and Credit Card Receivables due from debit and credit cards issued by U.S. national or state-chartered depository institutions are of sufficient liquidity and quality to be eligible securities pursuant to FC § 2086.

2. Pursuant to FC § 2083(b)(2), the Commissioner finds that ACH Receivables, Debit Card Receivables, and Credit Card Receivables, subject to the conditions set forth in the Order below, are of such quality that exclusion of the value of such eligible securities is not necessary.

ORDER

Pursuant to FC §§ 2086 and 2083(b)(2), the Commissioner orders as follows:

The Commissioner declares that ACH Receivables, Debit Card Receivables, and Credit Card Receivables (collectively referred to as "Receivables") are eligible securities subject to the following conditions:

1. The aggregate value of the Receivables that qualify as eligible securities pursuant to this Order Declaring Eligible Securities (Order) cannot exceed 20% of the aggregate value of all eligible securities owned by the money transmitter licensee (Licensee);

2. The value of Receivables that qualify as eligible securities pursuant to this Order that are due from any one person and the affiliates of that person cannot exceed 10% of the aggregate value of all eligible securities owned by the Licensee;

3. The value of Receivables that have been outstanding for more than 10 business days, are excluded from the aggregate value of eligible securities owned by the Licensee;

4. ACH Receivables must be due from U.S. national or state-chartered depository institutions;

5. Debit Card Receivables and Credit Card Receivables must be due from debit and credit cards issued by U.S. national or state-chartered depository institutions; and

6. Receivables may be reported by the Licensee as a) cash, cash items, or cash in transit or b) as ACH, Credit or Debit Card Receivables or due from banks on the Licensee's balance sheet, subject to the Call Report Order and Instructions as amended from time to time.

This Order is effective immediately and shall remain in effect until revoked, amended, superseded, suspended, or supplemented by further order of the Commissioner.

Dated: May 28, 2013

Teveia Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
TRACI STEVENS, Acting Undersecretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
WILLIAM S. HARAF, Commissioner of Financial Institutions
www.dfi.ca.gov

February 22, 2011

REDACTED

Re: Opinion Request

Dear REDACTED:

This responds to your letter dated January 18, 2011, in which you requested a determination as to whether the activities of a credit counseling agency (CCA) would be considered engaging in "money transmission" and therefore would require licensing under the recently enacted California Money Transmission Act.

FACTUAL BACKGROUND.

You describe the facts as follows. CCAs serve financially distressed consumers with the repayment of their debts to creditors through negotiated concessions (approved by the creditors) such as lowered interest rates and the elimination of late fees or penalties. (For ease of reference, we will refer to these as debt management plans or DMPs.) Through DMPs, the consumer pays a single monthly payment to the CCA which, in turn, disburses the appropriate payment as due to each creditor. In the course of serving these consumers, the CCAs are, in fact, receiving money from consumers, retaining it in trust account, and then transmitting it to creditors for the purpose of paying the customers' bills, invoices, or accounts.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o), in relevant part, defines "money transmission" as "receiving money for transmission." FC § 1803(s), in relevant part, defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 1806 provides for a public interest exemption to the licensing requirement of § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO CCA ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, through a DMP, a CCA receives debtors' funds and thereafter distributes, or transmits, those funds to the debtors' creditors in accordance with the terms of the repayment plan. Thus, CCAs receive money for transmission within or outside the United States. Pursuant to FC § 1810, CCAs would need to obtain a license unless exempt.

B. Exemption.

As you note, CCAs meet the definition of "prorater" as defined in FC § 12002.1 of the California Proraters Law. As such, CCAs are already licensed and regulated by the California Department of Corporations. It would therefore be duplicative to require licensing of CCAs under the Money Transmission Act. Moreover, such licensing would result in CCAs being subject to two regulatory schemes and would confuse jurisdiction. Finally, CCAs' business of money transmission is incidental to its credit counseling activities.

For these reasons, there are hereby exempted from the provisions of Chapter 14, Division 1 of the FC, as being in the public interest and the regulation of which is not necessary, the offering and providing of DMPs to California consumers by CCAs.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

March 29, 2013

REDACTED

Re: Request for Exemption from the Money Transmission Act

Dear REDACTED:

This responds to your joint letter, dated June 12, 2012, on behalf of REDACTED requesting an exemption under Financial Code § 2011 from the licensing requirements of the Money Transmission Act.

Your request had been granted. An order of exemption is enclosed.

Please contact the undersigned at 213.897.2172 if you have any questions regarding this matter.

Sincerely,

Wallace M Wong
WALLACE M. WONG
Senior Counsel

WMW:is
Enclosure
cc: Teveia R. Barnes, Department of Financial Institutions, San Francisco
Robert Venchiarutti, Department of Financial Institutions, San Francisco
Tara Murphy, Department of Financial Institutions, San Francisco

45 Fremont Street, Suite 1700
San Francisco, CA 94105
(415) 263-8500

1810 13th Street
Sacramento, CA 95811
(916) 322-5966

300 S. Spring Street, Suite 15513
Los Angeles, CA 90013
(213) 897-2085

7575 Metropolitan Drive, Suite 108
San Diego, CA 92108
(619) 682-7227

STATE OF CALIFORNIA

DEPARTMENT OF FINANCIAL INSTITUTIONS

In the Matter of)
REDACTED)

ORDER OF EXEMPTION
(FINANCIAL CODE § 2011)

Pursuant to Financial Code § 2011, the Commissioner of Financial Institutions (Commissioner) hereby exempts from Financial Code § 2030(a) each of REDACTED to the extent that any of them are engaged in the business of money transmission in this state, or advertise, solicit or hold themselves out as providing money transmission in this state in connection with any of them sending bills to and receiving payments from their respective customers with respect to payments owed to third-parties, and transmitting payments for their respective customers to the third-parties as from time to time required or authorized by the California Public Utilities Commission (CPUC).

The Commissioner finds this order of exemption to be in the public interest, and that the regulation of the activities exempted by the order would be duplicative and not necessary for the purposes of Division 1.2 of the Financial Code (commencing with Financial Code § 2000) because the CPUC has expansive regulatory authority over utilities. The California Constitution grants the CPUC authority to, among other things, fix rates, establish rules, examine records, issue subpoenas, punish for contempt and prescribe a uniform system of accounts. The Public Utilities Code grants the CPUC authority to, among other things, supervise and regulate public utilities and do all things which are necessary and convenient in the exercise of such power. The staff of the CPUC has authority to inspect the books of regulated utilities and require reports as the CPUC prescribes. Individuals and entities are allowed to file complaints against utilities before the CPUC. Under the Public Utilities Code, the CPUC may, after a hearing, find that rates in connection with any service, product or commodity unlawful, unjust, unreasonable or discriminatory and can order a change to the rates or practices. The CPUC may also order restitution, fines, changes or other remedies.

This Order may be revoked, amended or suspended by further order of the Commissioner.

March 28, 2013

Teveia Barnes

TEVEIA R. BARNES
Commissioner of Financial Institutions

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

April 9, 2012

REDACTED

Re: Opinion Request

Dear REDACTED:

This responds to your e-mail dated March 27, 2012. You requested a determination as to whether the proposed activities of an accelerated car loan repayment provider (Repayment Provider) would require a money transmission license under the Money Transmission Act (CA Financial Code § 2000 et seq.), a license under the Check Sellers, Bill Payers & Proraters Law (CA Financial Code § 12000 et seq.), or any other license/registration, in order to operate in California.

Our opinion is limited only to an analysis of the licensing requirements under the Money Transmission Act. We cannot opine as to the requirements under the Check Sellers, Bill Payers & Proraters Law because that law is administered by the California Department of Corporations. Similarly, we cannot opine as to any other licensing or registration requirements over which the Department does not have jurisdiction.

FACTUAL BACKGROUND.

You describe the facts as follows. Under the proposed program to be offered by the Repayment Provider, a consumer, with an outstanding retail installment contract or lease, would authorize the Repayment Provider to automatically deduct from the consumer's designated deposit account one-half of the scheduled monthly payment on the installment sales contract or lease every other week. Those funds would be deposited into one or more federally-insured deposit accounts maintained by the Repayment Provider and held in a fiduciary capacity on behalf of the consumer. Once a month, the Repayment Provider would transmit the applicable monthly payment on the note or lease to the holder or servicer on behalf of the consumer. Additionally, every six months, the Repayment Provider would transmit an amount equal to one-half of the monthly payment to the holder of the note or lease, resulting in the equivalent of 13 monthly payments each year. The consumer would benefit from the accelerated principal reductions. The consumer would pay the Repayment Provider a non-refundable application fee to enroll in the program and the Repayment Provider would charge the consumer an electronic debiting fee for each transaction. The Repayment

Provider would not lend funds to the consumer and payments are not made unless sufficient funds are available in the account(s) to make payments. Funds would not be transmitted outside the United States.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 2030(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 2003(o)(3), in relevant part, defines "money transmission" as "receiving money for transmission."

FC § 2003(s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

APPLICATION OF MONEY TRANSMISSION ACT TO THE REPAYMENT PROVIDER'S PROPOSED ACTIVITIES.

Based on your description of the proposed activities, the Repayment Provider would need a money transmission license under the Money Transmission Act in order to operate in California. Under the proposed program, the Repayment Provider would receive funds via an automatic deduction from the consumer's deposit account. Those funds would be deposited into one or more federally-insured deposit accounts maintained by the Repayment Provider and held in a fiduciary capacity on behalf of the consumer. Thereafter, the Repayment Provider would transmit the funds to the holder or servicer on behalf of the consumer.

Thus, the Repayment Provider is "receiving money for transmission" and would need a money transmission license under the Money Transmission Act in order to offer its proposed program in California.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
TRACI STEVENS, Acting Undersecretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
WILLIAM S. HARAF, Commissioner of Financial Institutions
www.dfi.ca.gov

April 18, 2011

VIA E-MAIL & U.S. MAIL

REDACTED

Re: Opinion Request

Dear REDACTED:

This responds to your letter dated April 1, 2011, in which you request a determination as to whether the proposed activities of REDACTED Inc. (REDACTED would require a money transmission license under California Financial Code § 1800 et seq.

FACTUAL BACKGROUND.

You describe the facts as follows. REDACTED is working with a commercial bank (Bank) to sell an FDIC insured, general purpose re-loadable, open loop stored value card that would be marketed to REDACTED customers (Program). In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. REDACTED would sell the cards through REDACTED locations as authorized by the Bank. REDACTED would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would immediately be liable to the cardholder for the funds, and REDACTED would settle with the Bank on a daily basis. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) §1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC §1803(o)(2), in relevant part, defines "money transmission" as "selling or issuing stored value."

FC §1806 provides for a public interest exemption to the licensing requirement of §1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO [redacted] ACTIVIITES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, [redacted] intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 1803(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), [redacted] activities fall within the Money Transmission Act. Pursuant to FC §1810, [redacted] would need to obtain a license unless exempt.

B. Exemption.

As you note, the stored value cards that [redacted] intends to sell are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject [redacted] to two regulatory schemes, and would confuse jurisdiction.

For these reasons, there is hereby exempted from the provisions of Chapter 14, Division 1 of the FC, as being in the public interest and the regulation of which is not necessary, the selling of a bank-issued, FDIC insured, general purpose re-loadable, open loop stored value card in California by [redacted]

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
TRACI STEVENS, Acting Undersecretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
WILLIAM S. HARAF, Commissioner of Financial Institutions
www.dfi.ca.gov

June 14, 2011

[redacted]

Re: Opinion Request

Dear [redacted]:

This responds to your letter dated April 19, 2011, in which you requested a determination as to whether the proposed activities of [redacted] would require a money transmission license under California Financial Code § 1800 et seq.

FACTUAL BACKGROUND.

You describe the facts as follows. [redacted] serves as a program manager to federal and state charted banks who wish to offer a Visa or MasterCard branded, general purpose, reloadable debit card (Program). Specifically, in California, according to the Card Issuance Agreement (Agreement) attached to your letter of May 20, 2011, [redacted] will serve as the marketer of cards issued by [redacted] (Bank). Per the Agreement, all solicitation material used by [redacted] will be reviewed and approved in writing by Bank prior to its use in the marketplace. In the proposed Program, the Bank would issue the cards, enter into a cardholder agreement with the customers, hold cardholder funds in FDIC insured accounts, and honor the transactions made pursuant to the cardholder agreement. [redacted] would sell the cards through its agent locations. [redacted] would not hold any cardholder funds associated with the Program. All funds would be immediately loaded onto a card, the Bank would immediately be liable to the cardholder for the funds, and [redacted] would settle with the Bank the next business day. Only the Bank, whose deposits are FDIC insured, would be liable to a cardholder for payment of any amount owing on a card.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o)(2), in relevant part, defines "money transmission" as "selling or issuing stored value."

FC § 1806 provides for a public interest exemption to the licensing requirement of § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO [redacted] ACTIVITIES.

A. Engaging in the Business of Money Transmission.

Based on your representation of the facts, [redacted] intends to sell stored value cards in this state. Thus, even though the Bank will be the issuer of the stored value cards, because FC § 1803(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), [redacted] activities fall within the Money Transmission Act. Pursuant to FC § 1810, [redacted] would need to obtain a license unless exempt.

B. Exemption.

As you note, the stored value cards that [redacted] intends to sell are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product. As such, these cards are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject [redacted] to two regulatory schemes, and would confuse jurisdiction.

For these reasons, the selling of a bank-issued, FDIC insured, general purpose, re-loadable, stored value card in California by [redacted] is

> considered to be in the public interest and that the regulation of this transaction is not necessary, and therefore, is hereby exempted from Chapter 14, Division 1 of the FC.

Sincerely,

PAUL T. CRAYTON
Senior Counsel

PTC:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
TRACI STEVENS, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
WILLIAM S. HARAF, Commissioner of Financial Institutions
www.dfi.ca.gov

July 26, 2011

[redacted]

Re: Opinion Request

Dear [redacted]:

This responds to your letter dated June 3, 2011, and other various communications with the Department in which you request a determination as to whether the activities of [redacted] Corporation ([redacted] would require a money transmission license under California Financial Code § 1800 et seq.[1]

FACTUAL BACKGROUND.

You describe the facts as follows. [redacted] markets, distributes, and services two types of products: bank-issued, FDIC insured, reloadable prepaid MasterCard and Visa branded debit cards (Cards) and its [redacted] product.

A. Cards.

[redacted] Bank[2] (Bank) issues the Cards, enters into a cardholder agreement with the customers, holds cardholder funds in FDIC insured accounts, and honors the transactions made pursuant to the cardholder agreement. [redacted] has developed a network of retail locations known as the [redacted] Financial Network (Network), through which customers may load funds to the Cards. These retail locations are selected by [redacted] and approved by the Bank. [redacted] has entered into various agreements with merchants and resellers, who are part of the Network, to sell [redacted] Network-related products (including Cards and the [redacted]

---

[1] [redacted] also requested a determination as to whether licensing was required under the "Payment Instruments Law (Division 16 (commencing with section 33000) of the Financial Code)." The Payment Instruments Law was repealed as part of the newly enacted Money Transmission Act. The new Money Transmission Act (commencing with Financial Code § 1800) now provides for the regulation and licensure of persons in the business of money transmission, defined to mean the selling or issuing of payment instruments, stored value, or receiving of money for transmission. Thus, we will deem your request to be an inquiry under the Money Transmission Act.

[2] We acknowledge that [redacted] also has contractual relationships with other banks to provide services, including marketing, distribution and fulfillment, customer service, and certain information technology services, with regard to other branded prepaid cards. Those services and products are similar in nature to the Cards issued by [redacted] Bank. This letter and our analysis herein are intended to cover those services and prepaid card products as well.

When a customer desires to acquire a Card, the customer purchases the card from a merchant or retailer. The customer pays the retailer the purchase price for the Card plus the amount that the customer initially wants to load onto the Card. The retailer then transmits an electronic message to [redacted] indicating that a card package was sold and the amount of the initial value load. [redacted] then provides this information to the Bank. Following purchase, the customer must contact [redacted] to complete the activation process.

All funds received from the sale of the Cards are forwarded by the retailers directly to the Bank and into a Bank account owned and controlled by the Bank and to which neither [redacted] nor the retailers have access. [redacted] has no settlement relationship with either the Bank or any retailer, and at no time does [redacted] have access to customer funds. The Bank is solely liable to its customers for the Card and for all customer funds. At no point does [redacted] carry as an asset or liability on its balance sheet the value of funds in any of the Bank accounts through which customer Card funds flow.

B. [redacted]

The [redacted] is a non-reloadable multi-purpose product which can be used to: (1) reload Cards, (2) reload prepaid cards issued by other banks, (3) pay bills of contracted bill payers, and (4) add money to PayPal accounts. Regardless of the use, the Bank is responsible for the funds from the time the [redacted] is purchased until the time the funds are loaded to the [redacted] or other prepaid card or account, transferred to the bank that issued the prepaid card or account, or used to make payment to a third party. In the case of bill paying, the Bank is the entity performing the bill paying. [redacted] is responsible for signing up retailers to sell the [redacted] and acceptance partners to accept the [redacted] but [redacted] has no role in the funds flow and does not ever actually pay bills. The Bank acts as the settlement agent for all funds going to other banks and to contracted payees.

> The flow of funds with regard to the REDACTED is the same as that described above regarding the Cards. All funds received from the sale of the REDACTED are forwarded by the retailers directly to the Bank and into a Bank account owned and controlled by the Bank and to which neither REDACTED nor the retailers have access. At no point does REDACTED carry as an asset or liability on its balance sheet the value of funds in any of the Bank accounts through which REDACTED funds flow.

CALIFORNIA MONEY TRANSMISSION ACT.

California Financial Code (FC) § 1810(a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 1803(o) defines "money transmission" as any of the following:

(1) "Selling or issuing payment instruments."
(2) "Selling or issuing stored value."
(3) "Receiving money for transmission."

FC § 1806 provides for a public interest exemption to the licensing requirement of § 1810. Section 1806 states:

> The commissioner may, by regulation or order, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any person or transaction or class of persons or transactions, if the commissioner finds such action to be in the public interest and that the regulation of such persons or transactions is not necessary for the purposes of this chapter.

APPLICATION OF MONEY TRANSMISSION ACT TO REDACTED ACTIVITIES.

Based on your representation of the facts, we consider the Cards and the REDACTED to be stored value products. Thus, we need to apply FC § 1803(o)(2), which includes selling *or* issuing stored value, to this situation.

A. The Bank is Issuing the Stored Value.

With regard to stored value, FC § 1803(k) defines "issuer" as "the entity that is liable to the holder of stored value and has undertaken or is obligated to pay the stored value."

The cardholder agreement defines the Bank as "the issuer of the Card." REDACTED is defined as "the third party that administers the Card program." Thus, by the terms of the cardholder agreement, the Bank is the issuer of the Cards.

Similarly, according to the REDACTED Terms and Conditions of Use, the Bank is responsible for the funds from the time the REDACTED is purchased until the time the funds are loaded to the REDACTED or other prepaid card or account, transferred to the bank that issued the prepaid card or account, or used to make payment to a third party. REDACTED is defined as "the third party that administers the REDACTED Thus, based on the definition of "issuer" in § 1803(k), we consider the Bank to be issuer of the REDACTED

B. REDACTED is Selling Stored Value.

REDACTED is selling stored value in this state through the Network and via its marketing efforts, including signing up retailers. Thus, even though the Bank is the issuer of the stored value, because FC § 1803(o)(2) broadly defines "money transmission" as "*selling* or issuing stored value" (emphasis added), REDACTED activities fall within the Money Transmission Act. Pursuant to FC § 1810, REDACTED would need to obtain a license unless exempt.

C. Exemption.

The Cards that REDACTED sells are bank-issued and FDIC insured, and the risk of loss of customer funds resides with the Bank at all times. Because of these characteristics, we consider this type of stored value card to be a banking product.

Similarly, the Bank is responsible for the value of the REDACTED from the time the REDACTED is purchased until the time the funds are loaded to the REDACTED or other prepaid card or account, transferred to the bank that issued the prepaid card or account, or used to make payment to a third party. Therefore, we consider the REDACTED to be a banking product as well.

> As such, the Cards and the [redacted] are already subject to the regulatory scheme applicable to the banking system. To require licensing under the Money Transmission Act in this circumstance would be unnecessary, would subject [redacted] to two regulatory schemes, and would confuse jurisdiction.
>
> For these reasons, the selling of an FDIC insured, re-loadable, prepaid Mastercard/VISA stored value card (i.e., the Cards) and the selling of the [redacted] in California by [redacted] are considered to be in the public interest, and the regulation of which is not necessary, and therefore, are hereby exempted from Chapter 14, Division 1 of the FC.

Finally, the revised [redacted] Terms and Conditions of Use, substantially in the form attached to the e-mail of [redacted] dated June 14, 2011, are acceptable.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
TRACI STEVENS, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
WILLIAM S. HARAF, Commissioner of Financial Institutions
www.dfi.ca.gov

December 6, 2011

[redacted]

Dear [redacted]:

This responds to your letter of October 26, 2011, and our telephone conversation of December 1, 2011 in which you request a determination as to whether the activities described in your letter would require licensing in California. You describe the facts as follows:

> [redacted] [redacted] is a Money Services Business licensed by the State of Texas. [redacted] proposes to perform foreign currency exchange services in California wherein customers will exchange dollars for pesos and/or pesos for dollars. The service will be conducted in person, at [redacted]'s exchange window. [redacted] will not hold customer funds for future transmission nor be financially liable to the customer. Conceptually, the customer will physically walk into an [redacted] business location and purchase a commodity (pesos) at which time the transaction will be complete.

Under these facts, [redacted] is not engaged in money transmission and is not subject to licensing under the Money Transmission Act. Please be advised that our position is based solely on the representations contained in your letter and phone conversation. Any change in the facts or circumstances, as we understand them, could lead to a different conclusion.

Sincerely,

PAUL T. CRAYTON
Senior Counsel

PTC:lca

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STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

July 3, 2012

VIA E-MAIL & U.S. MAIL

[redacted]

Re: [redacted] - Eligible Securities

Dear Mr. Teitelbaum:

We have reviewed the memorandum, dated May 25, 2012, submitted as part of [redacted] application to the California Department of Financial Institutions (Department). The memorandum raises the issue of whether bank deposits held for the benefit of a licensee's customers (FBO accounts) can be considered an eligible security.

As you correctly point out, the applicable code sections governing the eligible security requirement are California Financial Code (FC) §§ 2081 and 2084. FC § 2081 requires that a licensee must "at all times own eligible securities" having a specified value. FC § 2084(a) defines ownership as follows: "A licensee shall be deemed to own an eligible security only if the following apply: (1) The licensee owns the eligible security solely and exclusively in its own right, both of record and beneficially."

FBO accounts, by their very nature, cannot be "owned" by a licensee as required by FC § 2084(a). FBO accounts are deposits held for the benefit of a licensee's customers, not the licensee. Thus, a licensee cannot own the FBO account "both of record and beneficially."

FC § 2081(c) is not inconsistent with this interpretation. Section 2081 merely provides an implied exception to the general rule of ownership set forth in § 2084. Section 2081 imposes a statutory trust for the benefit of a licensee's customers only in the limited circumstances of bankruptcy or receivership of the licensee or an action by a creditor against the licensee. Absent those explicitly noted limited circumstances, all eligible securities are not held in trust for the benefit of a licensee's customers.

Accordingly, the Department reaffirms its conclusion that FC § 2084(a) precludes a licensee from treating FBO accounts as eligible securities because FBO accounts cannot be owned by a licensee.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

September 24, 2012

VIA EMAIL & U.S. MAIL

[redacted]

Re: [redacted] - Eligible Securities

Dear [redacted]:

This is in response to your letter, dated July 13, 2012, various subsequent email communications, and to our teleconference of August 29, 2012, all regarding whether bank deposits held for the benefit of a licensee's customers (FBO accounts) can be considered an eligible security, if the bank issues a "no lien" letter waiving "any right, charge, security interest, lien, set-off or claim of any kind against". . . the licensee.

The applicable code sections governing the eligible security requirement are California Financial Code (FC) §§ 2081 and 2084. FC § 2081 requires that a licensee must "at all times own eligible securities" having a specified value. FC 2084(a) defines ownership as follows: "A licensee shall be deemed to own an eligible security only if the following apply:

(1) The licensee owns the eligible security solely and exclusively in its own right, both of record and beneficially.

(2) The eligible security is not subject to any pledge, lien, or security interest.

(3) The licensee can freely negotiate, assign, or otherwise transfer the eligible security."

As we discussed in our phone call, the Department of Financial Institutions (DFI or the Department) holds that each element of FC 2084(a) must be met in order to establish ownership. Therefore, if any one element is untrue, then ownership does not hold for eligible securities purposes.

In the case at hand, [redacted] holds FBO accounts at [redacted] Bank (Bank) and Bank has issued a "no lien waiver" to [redacted] The agreement between [redacted] and Bank, dated June 1, 2012, clearly states that the [redacted] accounts are "on behalf of and for the benefit of its [redacted] customers." FBO accounts, by their very nature, cannot be "owned" by a licensee as required by FC § 2084(a). These accounts are deposits held for the benefit of the licensee's customers, not the licensee. Thus, [redacted] cannot own the FBO accounts "both of record and beneficially." The lack of ownership exists even if there is an effective "no lien" agreement in place because all three elements of FC 2084(a) have not been met, namely element (1).

Accordingly, the Department reaffirms its conclusion that FC § 2084(a) precludes [redacted] from treating FBO accounts as eligible securities because FBO accounts cannot be owned by a licensee.

Sincerely,

PAUL T. CRAYTON
Senior Counsel

PTC:lca
cc: Robert Venchiarutti, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

November 27, 2012

VIA EMAIL & U.S. MAIL

[redacted]

Re: [redacted]

Dear [redacted]:

We have reviewed the letters that were submitted on May 18, 2012 and July 27, 2012, on behalf of [redacted] ([redacted] In summary, [redacted] requested a determination by the Department of Financial Institutions (DFI) as to whether the payment products and services offered by [redacted] ([redacted] products and services) constitute money transmission under the California Money Transmission Act (MTA). DFI concludes that [redacted] products and services do constitute money transmission, and therefore those products and services are subject to regulation under the MTA.

FACTUAL BACKGROUND

A. [redacted] – PRODUCTS AND SERVICES.

The July 27 letter states that the only payment products that [redacted] currently offers are the following:

1. [redacted]
2. [redacted]
3. [redacted]

The letter further states that the [redacted] service ([redacted] is offered by [redacted] affiliate, [redacted]. However, [redacted] issues the [redacted] Prepaid "Human Intelligence Tasks" (Prepaid HITs) and processes payments in connection with [redacted]

B. [redacted] USER AGREEMENT.

The July 27 letter indicates that users of [redacted] enter into the [redacted] Payments User Agreement ([redacted] User Agreement), which governs all possible customer relationships with [redacted] In other words, there is not a separate user agreement for each [redacted] product.

The following are select sections of the [redacted] User Agreement that are of particular relevance to DFI's analysis of whether [redacted] products and services are subject to regulation under the MTA.

The introductory portion of the User Agreement explains the scope of the User Agreement: "This Agreement applies to your use of the Service whether you send or receive payments or you initiate payments on behalf of other users through an Application."

Section 3.2, in relevant part, states: "Your Authorization. You authorize us to hold, receive, and disburse funds on your behalf in accordance with your payment instructions (subject to the terms of this Agreement and our Policies), whether provided to us directly or through a Provider's Application."

Section 4.1, in relevant part, states: "When you send a payment, you remain the owner of those funds until that payment is accepted by the recipient. We hold those funds on your behalf, but you will not be able to disburse or send those funds to any other user unless the initial transaction is cancelled or rejected. If a payment is denied or unclaimed by the recipient, the funds will be returned to the sender (less applicable fees). We are not liable to any person for any damages associated with any unaccepted payment. Any time you send funds you are doing so at your own risk. "

Section 7.5.4 states: "Disclaimer. We are not a selling agent in connection with any sale by you of goods and/or services to any person. We have no control over the quality, fitness, safety, reliability, legality, or any other [redacted] of (a) any good or service that you may purchase or selling using the Service or (b) any Provider's Application that you may use to access the Service. Subject to our obligations under the [redacted] Guarantee, we do not issue refunds if a product or service turns out to not meet your expectations, or if the seller does not fulfill its commitments. Except to the extent the [redacted] Guarantee applies, we have no obligation, and cannot guarantee that, we will resolve any disputes related to any transaction to your satisfaction."

Section 16.5 states: "No Agency. Nothing in this Agreement is intended to or creates any type of joint venture, employee-employer, creditor-debtor, escrow, partnership, or any fiduciary relationship between you, us or our Affiliates."

C. FLOW OF FUNDS – [redacted]

The [redacted] funds flow chart, included with the July 27 letter, shows that card payments flow from Paymentech and external processors to [redacted] Processing Hub

Operating Account (Hub). The Hub bank account is owned and controlled by [redacted].[1] A daily sweep occurs to move funds between the Hub and [redacted] FBO Accounts (FBO Accounts) based on the daily change in merchant balances. FBO Accounts are held by [redacted] as custodian[2] and are under [redacted] custody and control.

For [redacted] transactions that derive from funds held as a stored value balance in an [redacted] Personal or Business Account, funds are tracked as they flow from the Personal or Business Accounts to a [redacted] user's Seller Account. Funds being debited from a Personal or Business Account and being credited to a [redacted] Seller Account follow the same settlement flows to and from the Hub and FBO Accounts.

The [redacted] and [redacted] [redacted] funds flow chart, included with the July 27 letter, also shows that card payments flow from [redacted] and external processors to the Hub. Cash in the Hub is owned and controlled by [redacted] A daily sweep occurs to move cash between the Hub and [redacted] FBO Accounts based on the daily change in external user balances.

For [redacted] transactions that derive from funds held as a stored value balance in an [redacted] Personal or Business Account, the funds stay in the FBO Account and are credited to the appropriate Business Account via internal accounting.

D. [redacted]

According to the July 27 letter, [redacted] provides a forum for third-party businesses (Requesters) and third-party workers (Workers) to enter into and complete service transactions. Workers are not [redacted] employees, and they do not provide services on behalf of [redacted] Requesters post service jobs called HITs on the [redacted] website in order to find third-party individuals interested in performing the requested work. Each Requester must prepay for work they intend on acquiring through [redacted] by purchasing [redacted] Prepaid HITs from [redacted] Prepaid HITs are issued by [redacted] Amounts are maintained in a single Prepaid HIT account by [redacted] solely for use on the [redacted] website.

When the Requester accepts the work, [redacted] requests that [redacted] process the payment for the completed services and settle with the Worker. If the Worker is in the U.S., funds paid to Workers are credited to the Worker's [redacted] Personal or Business Account. For non-U.S. Workers, Workers may only receive [redacted] gift cards, which are issued by [redacted].

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[1] Based on information provided by [redacted] in its application to DFI, the Hub appears as an asset with a corresponding liability on [redacted] balance sheet.

[2] Based on information provided by [redacted] the FBO Accounts are held off balance sheet by [redacted]

E. [redacted] TRANSACTIONS.

The July 27 letter states that [redacted] [redacted] processes payments for third-party merchants (Sellers) selling items on the [redacted] website. Sellers must agree to be bound by the [redacted] Participation Agreement. The Participation Agreement describes the payment service as follows. A buyer's authorized credit card payment is credited to a registered Seller's account summary. The buyer's payment is held in an [redacted] bank account. Payment funds are transferred on a rolling 14-day cycle to the Seller's designated checking account. [redacted] may earn interest or other compensation from the balances in its [redacted] bank accounts that result from the timing difference between [redacted] being paid by the buyer and [redacted] crediting the Seller's account.

Section 4 of the Participation Agreement also specifies that [redacted] Services' role is to provide:

> "... a platform for third-party sellers ... and buyers ... to negotiate and complete transactions, [[redacted] [redacted]] is not involved in the actual transaction between [third-party sellers and buyers] and is not the agent of and has no authority for either for any purpose."

Section 10 of the Participation Agreement further separates [redacted] from transactions between Sellers and buyers by specifically providing that Sellers are responsible for collecting applicable "Seller Taxes," such as sales taxes. In addition, the Participation Agreement does not preclude Sellers from taking direct action against buyers to collect any payments the Sellers believe are due to them for goods and services provided to buyers, such as in the case of where [redacted] fails to transfer funds to a Seller's account for goods.

We recognize that [redacted] also sells its own products, marketed as "[redacted] [redacted] Those types of transactions are not the subject of this letter.

CALIFORNIA MONEY TRANSMISSION ACT

California Financial Code (FC) § 2030 (a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 2003(o) defines "money transmission" as any of the following:

- (1) "Selling or issuing payment instruments."
- (2) "Selling or issuing stored value."
- (3) "Receiving money for transmission."

FC § 2003(s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 2003(v) defines "stored value" as "monetary value representing a claim against the issuer that is stored on an electronic or digital medium and evidenced by an electronic or digital record, and that is intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services. The term does not include a credit card voucher, letter of credit, or any stored value that is only redeemable by the issuer for goods or services provided by the issuer or its affiliate, except to the extent required by applicable law to be redeemable in cash for its cash value."

APPLICATION OF MTA TO [redacted] PRODUCTS AND SERVICES

A. [redacted] DOES NOT ASSERT ANY STATUTORY EXEMPTION FROM THE MTA.

Although invited to do so, [redacted] did not claim any statutory exemption from the MTA applied to [redacted] [redacted] or [redacted] Prepaid HITs. Rather, it asserts that [redacted] [redacted] and [redacted] Prepaid HITs do not meet the definition of money transmission. As explained below, DFI disagrees with [redacted] assertion and concludes that [redacted] products and services do meet the definition of money transmission. Accordingly, DFI has not been presented with any statutory basis to exempt [redacted] products and services from regulation under the MTA.

B. THE [redacted] AND [redacted] PRODUCTS MEET THE DEFINITION OF "RECEIVING MONEY FOR TRANSMISSION."

[redacted] delivers payments between customers and merchants through the [redacted] and [redacted] products. [redacted] asserts that it is acting as the payment agent of the merchant, and therefore, there is no transmission of money. [redacted] argument is two-fold. First, [redacted] asserts that "payment processing is not money transmission because Payment Processors do not receive money 'for transmission,' but as payment from the consumer to the merchant for goods or services." (Emphasis in original.) Second, [redacted] states that "payment to the agent constitutes payment to the principal . . . The remission of the payment from the agent to the principal is not 'transmission' under the plain meaning of the term because the agent and principal legally are one."

DFI disagrees with [redacted] argument for several reasons. We will address [redacted] second argument first.

1. The MTA does not have an exemption for agents of a payee.

As an initial matter, unlike New York's money transmission law, there is no statutory exception from the MTA for an agent of a payee. Even assuming *arguendo* that there were an exception for payee agents, [redacted] User Agreement specifically disclaims that there is any agency relationship created between [redacted] and the merchant. *See, e.g.*, Sections 7.5.4 and 16.5 of [redacted] User Agreement.

2. Principles of agency do not exempt [redacted] products and services from the MTA.

Whether or not [redacted] is acting as a payment agent for a merchant, [redacted] is nonetheless transmitting money between the customer and the seller. Section 3.2 of the User Agreement states that [redacted] will "hold, receive, and disburse funds on your behalf in accordance with your payment instructions." Section 4.1 provides that when "you send a payment, you remain the owner of those funds until that payment is accepted by the recipient. We hold those funds on your behalf." Thus, the [redacted] User Agreement contemplates that [redacted] is receiving money from the customer to transmit the payment to the merchant recipient. The customer cannot disburse or send those funds to any other user while [redacted] is holding them unless the transaction is cancelled or rejected.

The fact that [redacted] holds these payments and then disburses the funds to merchants underscores that [redacted] is receiving money for transmission. The flow of funds charts for [redacted] and [redacted] provided by [redacted] confirm that card payments flow from [redacted] and external processors to the [redacted] Processing Hub. The Hub bank account is owned and controlled by [redacted] Then, a daily sweep occurs to move funds between the Hub and the [redacted] FBO Accounts controlled by [redacted] based on the daily change in merchant and/or user balances.

This type of flow of funds is the traditional model for online or "mobile" money transmission – and in fact, the flow of funds for [redacted] [redacted] a product which [redacted] concedes is money transmission requiring a license, follows this exact model. Because [redacted] [redacted] and [redacted] [redacted] all have the same flow of funds and the same User Agreement, it is difficult to understand [redacted] position that only [redacted] [redacted] should be considered money transmission. The only apparent difference we can discern is that [redacted] is a person to person money transmission service.

The MTA, however, is not limited only to regulation of person-to-person funds transfers.

Lastly, all users of [redacted] products must enter into the same [redacted] User Agreement. Thus, [redacted] is not acting solely on behalf of the recipient merchants. It instead has a contractual relationship with, and is acting on behalf of, both parties to the transaction. As a result, rather than standing in the shoes of one party, [redacted] stands as an intermediary between the parties, transmitting monetary value between them. The conduct of transmitting money from one person to another person falls squarely within the meaning of money transmission under the MTA.

3. Bill payers, or those who receive money from a consumer to pay a merchant for goods or services, are not exempt from the MTA.

[redacted] asserts that "payment processing[3] is not money transmission because Payment Processors do not receive money 'for transmission,' but as payment from the consumer to the merchant for goods or services." (Emphasis in original.) [redacted] concedes that it receives money, and that it delivers money from the consumer to the merchant, but advances the position that because it is a "payment" to a merchant for goods and services, it is not a "transmission." Thus, [redacted] and [redacted] are supposedly payment products and/or services, and not money transmission.

Money transmission statutes, however, have for many years been applied to regulate companies that receive money "as payment from the consumer to the merchant for goods or services." One example is an activity commonly known as bill paying. Even though DFI did not regulate domestic money transmission until 2011 under the MTA, bill paying historically has been a regulated industry in California as it has been in most other states. Previously, bill payers had been licensed by the California Department of Corporations under the Check Sellers, Bill Payers and Proraters Law. (FC § 12000 *et seq.*) FC § 12200 states, in relevant part:

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[3] The MTA has a specific exemption that potentially could apply to "payment processors." FC § 2010(h). [redacted] declined the opportunity to seek a determination that this exemption applied to [redacted]'s products and services.

It is important to note, however, that "payment processing" is generally considered money transmission under the MTA. If payment processors were not engaged in money transmission, there would be no need to exempt any of them from the MTA. FC § 2010(h) exempts certain payment processors. This exemption clearly shows the intent of the drafters of the MTA to treat payment processors as persons engaged in money transmission. Otherwise, FC § 2010(h) would be surplusage.

> "No person shall engage in the business, for compensation, . . . of receiving money as agent of an obligor for the purpose of paying bills, invoices, or accounts of such obligor, . . . without first obtaining a license from the commissioner."

While bill payers are still potentially subject to regulation under the Check Sellers, Bill Payers and Proraters Law, many bill payers more recently have sought and obtained licenses from the DFI under the MTA. The MTA applies to companies that hold themselves out as bill payers because of the nature of the service they are providing to persons in California (receiving money from one person for transmission to another person). The act of receiving money from a consumer in order to pay a bill from a merchant for goods and services is money transmission. Simply characterizing this as a "payment" rather than a "transmission" would not change the nature of the activity that is taking place, nor our conclusion that this activity was money transmission. Our survey of other states indicates that they share the view that "bill paying" is subject to regulation. There are many examples of bill payers licensed in multiple jurisdictions under state money transmission laws. Thus, the act of delivering a payment is clearly money transmission.

The MTA was based in large part on the Uniform Money Services Act (UMSA).[4] In the Prefatory Note of the UMSA, the drafters specifically include in the definition of money transmission Internet *payment* mechanisms because they "are in many respects the functional equivalent of traditional money transmission." (UMSA, p. 9.) The drafters also note that the term money-services business or MSB has expanded to include Internet-related *payment* mechanisms and "*cyberpayments*." (UMSA, p. 8.)

> "Internet payment services can be viewed as the equivalent of traditional money services because they are also nondepository providers of financial services. Furthermore, Internet-related payment companies accept customer funds for transmission to third parties in the same way that traditional money services accept funds either in exchange for sale of a payment instrument or for transmission to a third party. Such Internet payment mechanisms include online bill payment services, Internet funds transfer services as well as stored-value issuers (which sell stored value that can be used online or offline)." (Emphasis added.) (UMSA, p. 8.)

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[4] For the text of the UMSA, see http://www.uniformlaws.org/shared/docs/money%20services/umsa_final04.pdf.

> Indeed, for over a decade it has been well established that companies who make payments between buyers and sellers on online marketplaces are subject to regulation as a money transmitter. Even the term "payment instrument" (a regulated activity under the MTA) includes the word "payment" since it typically is an instrument used to make a payment to a third party for goods or services. In sum, the act of delivering a payment as an intermediary between persons is subject to regulation under money transmission statutes. Characterizing an activity as a payment does not determine whether it is subject to the MTA; indeed, it is often an indication that money transmission is occurring. Thus, based on the foregoing, [redacted] and [redacted] are money transmission products and/or services that fall squarely within the MTA.

For the reasons stated above, and with regard to the [redacted] and [redacted] products, [redacted] is "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means" as defined in FC § 2003(s). Therefore, the [redacted] and [redacted] products must be licensed as money transmission.

C. [redacted] PREPAID HITS ARE STORED VALUE.

[redacted] asserts that Prepaid HITs are closed-loop and do not meet the definition of stored value because they are issued by [redacted] and are only redeemable by [redacted] We do not agree that the prepaid HITs are closed-loop. The exception in FC § 2003(v) states that stored value does not include . . . any stored value that is only redeemable by the issuer for goods or services **provided by the issuer** . . . ." (Emphasis added.) In [redacted] the services are provided by Workers, not [redacted] The Workers are not [redacted] employees and the services are not provided on behalf of [redacted] Thus, while the Prepaid HITs may be redeemable by the issuer, [redacted] they are not redeemable "for goods or services provided by" [redacted] Therefore, the prepaid HITs do not meet the exception from the definition of stored value. Accordingly, [redacted] Prepaid HITs must be licensed as stored value.

D. WITH REGARD TO THIRD-PARTY SELLERS, [redacted] [redacted] RECEIVES MONEY FOR TRANSMISSION.

As noted above, we recognize that [redacted] sells its own products, marketed as "Ships from and sold by [redacted] in addition to products offered by third-party Sellers. Transactions involving the sale of [redacted] own products do not fall within the MTA, and as such, are not subject to regulation by DFI.

With regard to third-party Sellers, however, the MTA does apply. [redacted] processes payments for third-party merchants selling items on the [redacted] website. According to the [redacted] Participation Agreement,

> [redacted] [redacted] holds a Buyer's payment in an [redacted] bank account on a rolling 14-day cycle before [redacted] Services transfers the funds to the Seller's designated bank account. The Participation Agreement also makes clear that [redacted] [redacted] is not an agent of the Sellers or the buyers as explained above in Section E of Factual Background.

> For the reasons discussed above in Section B of Application of MTA to [redacted] Products and Services, the activity of [redacted] [redacted] meets the definition of "receiving money for transmission" as defined in FC § 2003(s). Therefore, with regard to payment services provided to third-party Sellers, [redacted] [redacted] must be licensed as a money transmitter.

CONCLUSION

As discussed above, DFI has determined that [redacted] products and services and [redacted] [redacted] constitute money transmission under the MTA. Therefore, we recommend that [redacted] amend its pending application for a money transmission license to include the following products and/or services: [redacted] [redacted] [redacted] and [redacted] [redacted] (i.e., [redacted] transactions by third-party Sellers). If [redacted] chooses to amend its application, it must file any such amendment by January 31, 2013.

Please do not hesitate to call me at (415) 263-8528 if you have any questions.

Sincerely,

JENNIFER L.W. RUMBERGER
Senior Counsel

JLWR:lca

cc: Teveia Barnes, Commissioner
Robert Venchiarutti, Department of Financial Institutions, San Francisco
Tara Murphy, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

March 25, 2013

[redacted]

Re: [redacted]

Dear [redacted]

We have reviewed the letter that was submitted on October 22, 2012 (your letter), on behalf of [redacted] Inc. ([redacted] requested a determination by the Department of Financial Institutions (DFI) as to whether certain products and services offered by [redacted] ([redacted] products and services) constitute money transmission under the California Money Transmission Act (MTA). DFI concludes that [redacted] service of settling payments between lessors and lessees (the "Payment Service," as defined below) constitutes money transmission, and therefore is subject to regulation under the MTA.

FACTUAL BACKGROUND

Per your letter, "[redacted] provides an online platform that connects persons who have rooms or properties available for short term rentals...with guests seeking to rent such Accommodations." Members, users registered with [redacted] with property available for rent (hosts) may create a listing with pricing terms and members who wish to rent (guests) listed properties may submit a request to book such property through [redacted] website. The host has 24 hours to accept or reject the guest's request. "If the Host confirms the Guest's booking, [redacted]...collects the Total Fees [at the time of booking confirmation]...[redacted] holds the Total Fees until the date of the Guest's reservation." If the host cancels a booking after payment, [redacted] will refund the total fees paid by the guest to the guest. If the guest cancels a booking after payment, [redacted] will refund the fees paid, less any agreed upon cancellation fee charged by the relevant host. The total fees paid remain in the possession of [redacted] from the time the booking is confirmed until the time those fees are paid to the host (within 24 hours of the guest's arrival) or refunded to the guest (Payment Service).

Your letter and the Terms of Service (TOS) posted on the [redacted] website make clear that each host appoints [redacted] its limited agent to collect fees from the guest. The letter and TOS state that payment made by a guest to [redacted] is considered the same as making a payment directly to the host. Furthermore, the receipt provided by [redacted] to the guest states that the guest's obligation to the host is satisfied by the guest's payment to [redacted]. Per the TOS, "[redacted] is responsible for remitting such amounts, less [redacted] Host Fees, to the Host."

CALIFORNIA MONEY TRANSMISSION ACT

California Financial Code (FC) § 2030 (a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed or exempt from licensure under this chapter . . . ."

FC § 2003(o) defines "money transmission" as any of the following:

(1) "Selling or issuing payment instruments."
(2) "Selling or issuing stored value."
(3) "Receiving money for transmission."

FC § 2003(s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 2003(v) defines "stored value" as "monetary value representing a claim against the issuer that is stored on an electronic or digital medium and evidenced by an electronic or digital record, and that is intended and accepted for use as a means of redemption for money or monetary value or payment for goods or services. The term does not include a credit card voucher, letter of credit, or any stored value that is only redeemable by the issuer for goods or services provided by the issuer or its affiliate, except to the extent required by applicable law to be redeemable in cash for its cash value."

APPLICATION OF MTA TO [redacted] PRODUCTS AND SERVICES

A. [redacted] DOES NOT ASSERT ANY STATUTORY EXEMPTION FROM THE MTA.

[redacted] did not claim any statutory exemption from the MTA. Rather, it asserts that [redacted] does not meet the definition of money transmission. As explained below, DFI disagrees with [redacted] assertion and concludes that the Payment Service provided by [redacted] meets the definition of money transmission. Accordingly, DFI has not been presented with any statutory basis to exempt [redacted] from regulation under the MTA.

B. THE [redacted] PRODUCT MEETS THE DEFINITION OF "RECEIVING MONEY FOR TRANSMISSION."

The assertion that [redacted] is not subject to the MTA rests on two arguments: (1) "If a payee appoints an agent for purposes of collecting payment, there is no money transmission," and (2) "California law requires the Department to adopt the principal-agent construct in its implementation of the MTA." I will address these assertions in the order listed.

[redacted] argues: "If a payee appoints an agent for purposes of collecting payment, there is no money transmission."

When [redacted] receives payment from guests, it has the intention of holding the funds received until either refunded to the guest or transmitted to the host. [redacted] asserts that it is not transmitting funds between the guest and the host because it is acting as the agent of the host and, when it receives payment from the guest, the guest's obligation to the host is satisfied; therefore, the transaction from the guest's perspective is complete. In your letter, you state that "where a duly appointed agent accepts payment on behalf of its principal, the agent steps into the shoes of its principal and, as such, the activity is, by nature, not receiving money for transmission." This conclusion contradicts one of the principal purposes of an [redacted] transaction: transmitting the guest's funds to the host. Irrespective of liability, the transaction would not take place, if the guest's funds were not to be transmitted to the host. Logically, a host's primary reason to enter into any transaction with [redacted] is to receive the rental funds paid by the guest. The TOS informs the guest that the guest's funds will be transmitted to the host within 24 hours of the guest's arrival. Your letter states that [redacted] serves as the limited authorized agent of the Host for the purpose of accepting payments from the Guests on behalf of the Host and **is responsible for transmitting such payments** to the Host." (Emphasis added.) Money transmission is clearly taking place. [redacted] stands as an intermediary between the guest and the host, transmitting monetary value between them. The conduct of transmitting money from one person to another person falls squarely within the meaning of money transmission under the MTA.

You maintain that [redacted] steps into the shoes of the host. This is only true with respect to the guest's rental payment. [redacted] has no ownership or leasehold interest in the subject property. There is no subletting taking place between [redacted] and the guest. [redacted] only function, other than providing a market for the guest and host, is to ensure that the guest's funds are delivered to the host. If [redacted] were to rent the subject property from the host and, subsequently, sublet the property to the guest, it would have a leasehold interest in the property unrelated to the transmission of funds, so a transmission of funds may not arise. In such a case, the guest would be renting directly from [redacted] and [redacted] rental payment to the host would be unrelated to the guest's rental payment to [redacted] However, such is not the case in an actual [redacted] transaction, in which [redacted] has no interest in the property other than to facilitate the transaction between the guest and host, which includes transmitting the rental payment to the host.

In California, "receiving money for transmission" is not defined by the respective liability of the transaction's parties; it is defined as "receiving money...for transmission." The fact that the guest's liability to the host is satisfied when [redacted] accepts the rental payment has no bearing on whether money is being received for transmission.

Footnote 17 of your letter discusses the "push" and the "pull" of a transmission transaction. You say to view hosts as consumers who are protected by the MTA would result in the regulation of parties such as payroll processors. DFI does view hosts as consumers to be protected by the MTA, and DFI does regulate payroll processors. Again, in California, "receiving money for transmission" is defined by FC § 2003(s).

[redacted] argues: "California law requires the Department to adopt the principal-agent construct in its implementation of the MTA."

The implication of your statement, above, is that if DFI acknowledges Title 9, Agency, of the California Civil Code (Title 9) and incorporates the principals therein, funds are not being transmitted. However, that conclusion does not necessarily follow, because the precept and the conclusion are not related. The basis of your argument is that Title 9 conflicts with the MTA. There is no inconsistency. Title 9 and the MTA are not mutually exclusive, are not at cross purposes, and each can be simultaneously applicable. Fundamentally, Title 9 establishes liability to the principal for the actions of its agent. (Civil Code § 2330) In the case of [redacted] consistent with Title 9, the guest's liability to the host is satisfied by [redacted] acceptance of payment from the guest on behalf of its principal, the host. The host is foreclosed from pursuing the guest for the payments received by [redacted] This in no way precludes application of the MTA.

The MTA's purpose, per FC § 2001(d), is "to regulate money transmission businesses in this state." The MTA was enacted because "The failure of money transmission businesses to fulfill their obligations would cause loss to consumers, disrupt the payments mechanism in this state, undermine public confidence in financial institutions doing business in this state, and adversely affect the health, safety, and general welfare of persons in this state." [FC § 2001(c)] The breadth of the MTA far exceeds the specific liability of the parties of any given transaction, and does not conflict with Title 9. The MTA and Title 9 serve different purposes, and establishing who is liable to whom in consumer and business transactions in no way conflicts with the MTA's regulation of money transmission. REDACT TOS clearly state that the guest's liability to the host ends upon payment to REDAC in accordance with the relevant provisions of Title 9; the MTA helps ensure, through proper regulation, that REDA will have the financial and managerial wherewithal to successfully complete the transactions it facilitates. Therefore, REDA is subject to the MTA irrespective of its agency relationship to the host. As an analogy: a milkman, who is subject to the Agricultural Code, still needs a driver's license to deliver his product.

To help bolster your argument that Title 9, specifically Civil Code § 2330, should exempt REDA from regulation under the MTA, you point out that other state legislatures have exempted the agents of the payee from regulation under those states' money transmission statutes; therefore, DFI should take the same position to effectively harmonize the MTA with Title 9. However, as stated above, DFI sees no conflict between the MTA and Title 9. Further, the California legislature chose not to include the "agent-of-payee" exception in FC §§ 2010 or 2030. In light of that choice and the consistency between the MTA and Title 9, no additional harmonization by DFI is necessary.

You point out, in your letter, that FinCEN excludes from BSA regulation (as a money transmitter) "a person that only 'acts as a payment processor to facilitate the purchase of, or the payment of a bill for, a good or service through a clearance and settlement system *by agreement with the creditor or seller*.'" You also point out why FinCEN excludes such persons: because there is reduced BSA risk. In such a situation, DFI recognizes the reduced BSA risk; however, BSA is only one of several reasons DFI examines its licensees. DFI also examines money transmitters to help ensure that money transmitters fulfill their obligations to prevent a loss "to consumers, disrupt the payments mechanism in this state, undermine public confidence in financial institutions doing business in this state, and adversely affect the health, safety, and general welfare of persons in this state." [FC § 2001(c)]

CONCLUSION

For the reasons stated above, REDA is "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means" as defined in FC § 2003(s). Therefore, REDA must be licensed as a money transmitter.

Please do not hesitate to call me at (415) 263-8541 if you have any questions.

Sincerely,

PAUL T. CRAYTON
Senior Counsel

PTC:lca

cc: Teveia Barnes, Commissioner
Robert Venchiarutti, Department of Financial Institutions, San Francisco
Tara Murphy, Department of Financial Institutions, San Francisco

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DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

May 16, 2013

[redacted]

Re: [redacted]

Dear [redacted]

This is in response to your letters dated July 27, 2012, and February 7, 2013, in which you asked for the Commissioner's concurrence with your stated opinion that your client, [redacted] Development, LLC ([redacted] is not engaged in a business which is regulated by the California Money Transmission Act, Financial Code § 2000, et seq. (MTA). You furnished us with a copy of the agreement between [redacted] and [redacted] Bank & Trust, a copy of the Terms and Conditions statement which is provided to customers, a screen shot of the internet site which the customer sees, and a sample receipt.

FACTUAL BACKGROUND

According to your letter, [redacted] uses proprietary software to track, service and account for gifts and other monetary transactions initiated by family members and friends (customers) for the benefit of individuals incarcerated in California county jails (Facility). Such monetary transactions are initiated by the customers through kiosks located in the various Facilities or through internet or telephone based transactions. [redacted] has entered into an agreement with [redacted] Bank & Trust, [redacted] bank (FOB), which provides that FOB is responsible for the transmission of funds from the customer to the recipient inmate's account at the designated Facility.

When a customer initiates a transaction, funds intended by the customer for the benefit of the inmate are transferred from the customer directly to an account at FOB. Customers also receive a Terms and Conditions statement when they initiate the transaction, informing them that they are engaging in a fund transfer transaction with FOB, and a receipt naming FOB when they complete the transaction. FOB has sole custody and control of those funds and takes title to those funds until it arranges to move the funds to the individual Facility's bank account, where the Facility holds those funds in trust for the designated inmate. At no time does [redacted] have any ownership or control of the account or of any funds transmitted for the benefit of the inmate.

CALIFORNIA MONEY TRANSMISSION ACT

California Financial Code (FC) § 2030 (a) states: "A person shall not engage in the business of money transmission in this state, or advertise, solicit, or hold itself out as providing money transmission in this state, unless the person is licensed is or exempt from licensure under this division or is an agent of a person licensed or exempt from licensure under this division."

FC § 2003 (o) defines "money transmission" as any of the following:

(1) "Selling or issuing payment instruments."
(2) "Selling or issuing stored value."
(3) "Receiving money for transmission."

FC § 2003 (s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

FC § 2010 (d) exempts commercial banks from the MTA.

APPLICATION OF MTA TO [redacted] PRODUCTS AND SERVICES

[redacted] role as a provider of software does not constitute either receiving money for transmission or operating a money transmission business, as defined in the MTA. Commissioner's Opinion No. 001 provides that software application providers that only receive instructions, orders or directions to transmit money or monetary value and do not actually or constructively receive, take possession or hold any money or monetary value for transmission, and do not advertise, solicit or hold themselves out as receiving money for transmission have not received money for transmission for purposes of FC § 2003 (s). Accordingly, and based solely upon the descriptions and representations in your letters and attachments, our view is that [redacted] would not be deemed to be engaged in any money transmission activities in California which are regulated by the Department of Financial Institutions. Furthermore, although, there is money transmission occurring, it is being conducted by FOB, which is an exempt entity pursuant to FC § 2010 (d).

This opinion is based solely on the facts presented in your letters and the documents attached thereto, and may change if any of the conditions or circumstances under which the company provides services are altered in the future. If you have any questions or comments, please give me a call at (916) 322-5979.

Sincerely,

TONY LEHTONEN
Senior Counsel

TL:is
cc: Robert Venchiarutti, Deputy Commissioner, Department of Financial Institutions, San Francisco

STATE OF CALIFORNIA
BUSINESS, TRANSPORTATION AND HOUSING AGENCY

EDMUND G. BROWN JR., Governor
BRIAN P. KELLY, Acting Secretary

DEPARTMENT OF FINANCIAL INSTITUTIONS
TEVEIA R. BARNES, Commissioner of Financial Institutions
www.dfi.ca.gov

June 21, 2013

REDACTED
[redacted]

Re: REDACTED

Dear REDACTED

This responds to your letter of December 24, 2012, supplemental March 4, 2013 letter and information provided therewith, and your email of May 14, 2013 with revised REDACTE Terms and Conditions. You request confirmation from the Department of Financial Institutions (DFI) that REDACTE and the services that it offers are not subject to the California Money Transmission Act, California Financial Code § 2000 et seq. (CMTA). For DFI's review and consideration, you provided the following documents:

- The REDACTE Terms and Conditions;
- Revised REDACTE Terms and Conditions;
- The REDACTE Privacy Policy;
- The REDACTED Automated Clearing House Processing Agreement;
- Additional documentation, including a series of emails between representatives from REDACTED and REDACTE which supplement the REDACTED ACH Agreement and confirm the roles and responsibilities of CheckGateway and REDACTE and
- A PowerPoint presentation summarizing the REDACTE services

REDACTE is an automated savings program in which 5% to 20% of the dollar amount of "spend" transactions are calculated and transferred from a REDACTE customer ("User") checking account ("Funding Account") to a User savings account ("Destination Account") designated by the User. Spend transactions or spend amounts represent the payment of various bills or expenses owed and paid by the User. You confirmed that all such Funding and Destination accounts must be held at institutions the deposits of which are either Federal Deposit Insurance Corporation (FDIC) or National Credit Union Association (NCUA) insured. Further, it is DFI's understanding that the Funding Account and the Destination Account are in the name of the User, who has sole custody and control of these accounts, and that these accounts need not be in the same financial institution. Transfers occur on a weekly basis, and the fee to REDACTE ranges from zero to $5.00 and is paid at the end of each month in a transfer from the Destination Account to a REDACTE commercial bank account. Various parameters are set by the User and may be changed as deemed appropriate by the User. A minimum of $200 is to be maintained in the Funding Account to help avoid overdrafts.

California Financial Code (FC) § 2003 (o) defines "money transmission" as any of the following:

(1) "Selling or issuing payment instruments."
(2) "Selling or issuing stored value."
(3) "Receiving money for transmission."

FC § 2003 (s) defines "receiving money for transmission" as "receiving money or monetary value in the United States for transmission within or outside the United States by electronic or other means."

In the [redacted] business model, money is being transmitted from a Funding Account to a Destination Account. Both Accounts are required to be held in U.S. insured depository institutions. Both Accounts may or may not be within the same insured depository institution. [redacted] also represented that its ACH service provider ("Processor") is "the legal owner of all of [its] merchant processing funds" and that the Processor - not [redacted] is the party that actually debits and credits the Funding Accounts and to Destination Accounts. In other words, [redacted] confirmed that money actually was in the custody and control of a party other than the User or the insured depository institutions as part of the services it was providing to Users. Accordingly, money transmission is taking place through the [redacted] automated savings service.

The [redacted] Terms and Conditions (T&C) in Section 2 (a) provides that the Processor transfers and controls User funds transferred between Funding Accounts and Destination Accounts. The T&C further provides that [redacted] provides information to the Processor to allow the Processor to implement the savings services. The T&C provides other information about the funds held by and transferred by the Processor. In addition, the T&C identifies "[redacted] or another provider at [redacted] discretion" as the Processor. [redacted] is an automated clearing house (ACH) process provider. Accordingly, a plain reading of the T&C demonstrates that [redacted] is the Processor that transfers funds from a Funding Account to a Destination Account. [redacted] as the Processor, also has entered into the Automated Clearing House Processing Agreement with [redacted] Accordingly, as the Processor who holds and transfers funds, [redacted] must obtain a money transmission license or otherwise provide proof to DFI of its exemption from being so required. Alternatively, [redacted] can apply for a money transmission license and simply continue to use the Processor to conduct ACH transactions. In fact, this is precisely how all licensed money transmitters who accept and send money through the ACH system operate. Since [redacted] is in fact the direct client of the Processor, this may in fact be the best solution.

Finally, [redacted] on its webpage, states "[redacted] automatically transfers a user-defined percentage to the individual's chosen savings account." [redacted] is explicitly advertising that it "transfers" funds. The Commissioner, in Opinion No. 002, provides guidance for companies who do not actually or constructively receive funds for transmission, but nonetheless advertise that they provide money transmission. In order to be in compliance with FC § 2030(a), a person, whether or not the person is itself a licensed or exempt person or agent thereof, who advertises or solicits money transmission in this state on behalf of another person, may only do so on behalf of licensed (or exempt) money transmitters or their agents and must provide a disclosure in the person's advertising or solicitation materials that identifies: (1) the licensee(s), (2) the exempt person(s), or (3) the agent(s) and the licensee(s) or exempt person(s) that are their principals, as the entity(s) providing the money transmission. Examples of advertising materials, solicitations or other efforts to hold oneself out as providing money transmission that require such a disclosure include, but are not limited to: printed documents, website, emails, or display on electronic communication devices.

REDACTE cannot advertise, solicit or hold itself out as providing money transmission in California, unless it is licensed or exempt from licensure under the CMTA, or is an agent of a licensed money transmitter or an agent of a person exempt from licensure under the CMTA. Since neither REDACTE nor the Processor is licensed or exempt, REDACTE must immediately cease advertising its services in CA and/or arrange to partner with a licensed or exempt entity (with full and adequate disclosures) that can provide the money transmission for California Users.

Alternatively, REDACTE may also consider the possibility of being based in California and conducting money transmission outside of California and not with California Users. See Commissioner's Order of Exemption dated May 28, 2013 which is located on the DFI website.

In conclusion, we have determined that either REDACTE or Processor must apply for a money transmission license to conduct this business in California. Alternatively, REDACTE may partner with a licensed or exempt entity to conduct money transmission with California Users. Furthermore, REDACTE must immediately come into compliance with FC 2030(a) and Commissioner's Opinion No. 002, as discussed in greater detail above.

Sincerely,

Tara L Murphy

Tara L. Murphy
Assistant General Counsel

From: **McQuinn, Michael@DBO** Michael.McQuinn@dbo.ca.gov
Subject: Additional Responsive, Nonexempt Records
Date: May 30, 2014 at 5:44 PM
To: aarong@thinkcomputer.com

Mr. Greenspan:

On the basis of my search for records which are responsive to your February 17, 2014, request for records, I have determined that there are no records responsive to the following Items set forth in your letter:

1. Item 1: All written communications between DFI/DBO staff and employees of Golden State Advocacy, Inc., including, but not limited to email messages involving Robert Garcia and/or Robert Venchiarutti;
2. Item 9: All written communications between any DFI/DBO staff and the California State Auditor concerning Robert Venchiarutti and/or the Money Transmission Act.

I have further determined that the records which are responsive to the following categories requested in your February 17, email are exempt from disclosure, either wholly or in part:

1. Item 4 (wholly): All written communications between any DFI/DBO staff and Carol Van Cleef [exempt from disclosure pursuant to Government Code Section 6254, subd. (d), para. (1); records contained in or related to a licensing application];
2. Item 6 (partly): All written communications involving DFI/DBO policies relating to virtual currency (e.g. Bitcoin)-related companies' responsibilities under the Money Transmission Act [exempt from disclosure pursuant to Government Code Section 6254, subd. (d), para (4) and subd. (k); records contained in or related to information received in confidence and internal legal opinions that have been generated by an attorney for the Department and that are thus subject to the attorney work product privilege];
3. Item 12 (wholly): Any materials or written communications pertaining to the November 21, 2013, Informational Hearing on the Technology of Consumer Financial Transactions in Mountain View, CA not already available on the Assembly Banking Committee's website [exempt from disclosure pursuant to Government Code Section 6254, subd. (d), para. (3) and subd. (k) records that are preliminary drafts, notes, or communications, and records that are subject to the deliberative process privilege];
4. Item 13 (wholly): Any materials or internal communications explaining the DFI/DBO's interpretation of Financial Code Section 2175 [exempt from disclosure pursuant to Government Code Section 6254, subd. (k); records that are attorney-client communications or internal legal opinions generated by an attorney for the Department and that are thus subject to the attorney work product privilege].

The following responsive records are not exempt from disclosure and are attached to this or the email messages which follow:

1. Emails between Commissioner Jan Lynn Owen or other department officials and Mark Farouk or Eileen Newhall [responsive to Items 10 and 11];
2. Emails between Commissioner Jan Lynn Owen or Deputy Commissioner Robert Venchiarutti and Ezra Levine [responsive to Item 2];
3. A virtual currency advisory and press release published by the Department of Business

Oversight on April 30, 2014 [responsive, in part, to Item 6].

This message and those that follow constitute the Department of Business Oversight's final production of nonexempt records responsive to your **February 17, 2014**, request for records.

Regards,

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

Effective July 1, 2013, the Department of Corporations and the Department of Financial Institutions merged to form the Department of Business Oversight in accordance with the Governor's reorganization of state departments to provide services more efficiently and effectively.

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Emails to Legislature re Money Tran…_Part1.pdf

From:	Owen, Jan Lynn@DBO
Sent:	Thursday, February 06, 2014 8:54 AM
To:	'Levine, Ezra C.'
Subject:	RE: NY Transmitters Law

Thank you Ezra- let's connect up soon. Jan

Jan Lynn Owen
Commissioner
Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814

916-324-9011

www.dbo.ca.gov

From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Wednesday, February 05, 2014 12:04 PM
To: Owen, Jan Lynn@DBO
Subject: NY Transmitters Law

Jan—as promised here is the relevant NY Transmitters Act provision as well as the accompanying regulations. This has worked well for many years. Best regards and thanks!

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

:

Transmitters of Money Statute

- "No person shall engage in the business of selling or issuing checks, or engage in the business of receiving money for transmission or transmitting the same, without a license therefor obtained from the superintendent as provided in this article, nor shall person engage in such business as an agent, except as an agent of a licensee or as agent of a payee…" **§ 641.**

From NY Superintendent's Regulations Part 406.

- "As provided in Banking Law, section 641, the provisions contained in this Part shall not apply to an agent of a payee as defined in section 406.2(a) of this Part. Only agents of a payee which do not engage in any money transmission activities other than as an agent of a payee are exempt from the provisions of this Part." § **406.1**

- "The term *agent of a payee* means any person authorized by a payee to receive funds on behalf of the payee and to deliver such funds received from the payor to the payee." **§ 406.2(l)**.

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From:	Levine, Ezra C. <ELevine@mofo.com>
Sent:	Wednesday, February 05, 2014 9:27 AM
To:	Owen, Jan Lynn@DBO

Hello Jan—I am in La Jolla, avoiding the snow and cold in DC---any chance I could give you a call? What is the best number? Thanks and regards.

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

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McGuffin, Matthew@DBO

From:	Owen, Jan Lynn@DBO
Sent:	Thursday, August 15, 2013 11:26 AM
To:	'Levine, Ezra C.'
Cc:	Venchiarutti, Robert@DBO
Subject:	RE: License Application--World First USA

Ezra: thank you for your note- I have approved me. Bob and his team will send you what you need. Thank you for your patience. Jan

Jan Lynn Owen
Commissioner
Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814
916-324-9011

www.dbo.ca.gov

From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Thursday, August 15, 2013 9:46 AM
To: Owen, Jan Lynn@DBO
Subject: License Application--World First USA

Hello Jan—sorry to bother you with this one. We filed a transmitters license application for World First USA many, many months ago. I was told some time ago that all the information was complete. The application, so far as I am aware, is not controversial in any respect. Would it be possible to have someone track the status of the application? The client has been pestering me on this one. Thanks very much! Best regards.

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

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From: Levine, Ezra C. <ELevine@mofo.com>
Sent: Wednesday, February 05, 2014 9:29 AM
To: Owen, Jan Lynn@DBO
Subject: RE: RE:

REDACTED—my place in la Jolla. Thanks Jan

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

From: Owen, Jan Lynn@DBO [mailto:JanLynn.Owen@dbo.ca.gov]
Sent: Wednesday, February 05, 2014 12:29 PM
To: Levine, Ezra C.
Subject: RE:

I am going into a meeting that will last until 11:00- give me a number and I will call you. Jan

Jan Lynn Owen
Commissioner
Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814
916-324-9011

www.dbo.ca.gov

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Sent: Wednesday, February 05, 2014 9:27 AM
To: Owen, Jan Lynn@DBO
Subject:

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To:	'Levine, Ezra C.'
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From:	Levine, Ezra C. <ELevine@mofo.com>
Sent:	Thursday, August 15, 2013 11:26 AM
To:	Owen, Jan Lynn@DBO
Cc:	Venchiarutti, Robert@DBO
Subject:	RE: License Application--World First USA

Thanks Jan!!

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

From: Owen, Jan Lynn@DBO [mailto:JanLynn.Owen@dbo.ca.gov]
Sent: Thursday, August 15, 2013 2:26 PM
To: Levine, Ezra C.
Cc: Venchiarutti, Robert@DBO
Subject: RE: License Application--World First USA

Ezra: thank you for your note- I have approved me. Bob and his team will send you what you need. Thank you for your patience. Jan

Jan Lynn Owen
Commissioner
Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814
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McGuffin, Matthew@DBO

From: Levine, Ezra C. <ELevine@mofo.com>
Sent: Wednesday, February 05, 2014 12:04 PM
To: Owen, Jan Lynn@DBO
Subject: NY Transmitters Law

Jan—as promised here is the relevant NY Transmitters Act provision as well as the accompanying regulations. This has worked well for many years. Best regards and thanks!

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
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Transmitters of Money Statute

- "No person shall engage in the business of selling or issuing checks, or engage in the business of receiving money for transmission or transmitting the same, without a license therefor obtained from the superintendent as provided in this article, nor shall person engage in such business as an agent, except as an agent of a licensee or as agent of a payee…" **§ 641.**

From NY Superintendent's Regulations Part 406.

- "As provided in Banking Law, section 641, the provisions contained in this Part shall not apply to an agent of a payee as defined in section 406.2(a) of this Part. Only agents of a payee which do not engage in any money transmission activities other than as an agent of a payee are exempt from the provisions of this Part." § **406.1**
- "The term *agent of a payee* means any person authorized by a payee to receive funds on behalf of the payee and to deliver such funds received from the payor to the payee." **§ 406.2(l)**.

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From:	Farouk, Mark <Mark.Farouk@asm.ca.gov>
Sent:	Friday, March 08, 2013 10:05 AM
To:	Farouk, Mark
Subject:	Revised MTA hearing agenda
Attachments:	March 11 MTA electronic agenda Final.pdf

Subsequent to sending this yesterday we found a small mistake that hopefully no one noticed. ☺ Order of speakers and panels is the same on this version.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

Click on Sign to add text and place signature on a PDF File.

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0091
(916) 319-3081
FAX (916) 319-3181
CHIEF CONSULTANT
MARK FAROUK
CONSULTANT
KATHLEEN O'MALLEY
COMMITTEE SECRETARY
TIFFANY MORRISON

Assembly
California Legislature
ASSEMBLY COMMITTEE ON
BANKING AND FINANCE
ROGER DICKINSON, CHAIR
ASSEMBLYMEMBER, SEVENTH DISTRICT

Assembly Committee on Banking & Finance
Emerging Technology and the California Money Transmission Act

March 11, 2013
2:00p.m
California State Capitol, Room 444

I. Opening Remarks:

- Chair, Assemblymember Roger Dickinson
- Vice Chair, Assemblymember Mike Morrell

II. Regulation of the Money Transmission Act:

- Teveia Barnes, Commissioner, Department of Financial Institutions

III. Assessments of Emerging Payment Technology, The Money Transmission Act & Consumer Protection:

- Thomas Brown, Lecturer, UC Berkeley Law School and Partner, Paul Hastings LLP
- John Muller, Vice President & General Counsel, PayPal Inc.
- Michelle Jun, Senior Attorney, Consumers Union
- Rob Barnett, Vice President-Assistant General Counsel at Automatic Data Processing, Inc.

IV. Public comment.

McGuffin, Matthew@DBO

From: McQuinn, Michael@DBO
Sent: Thursday, July 25, 2013 11:18 AM
To: eileen.newhall@sen.ca.gov; mark.farouk@asm.ca.gov
Cc: Davis, Marilyn@DBO; Lehtonen, Tony@DBO; Hanna, John@DBO; Owen, Jan Lynn@DBO; O'Toole, Dave@DBO
Subject: PRA Response
Attachments: Records Request; Greenspan PRA Request.pdf

Good morning Eileen and Mark,

This morning the Department of Business Oversight responded to a Public Records Act request for, among other things, all correspondence with the Legislature concerning Assembly Bill 786 (Dickinson). Several of your emails with staff of the former Department of Financial Institutions were responsive to that request. These emails were disclosed once we determined that the Department's communications with legislative staff are not expressly exempted from disclosure under the Act.

As a courtesy, I am attaching a copy of the PRA request in addition to the Department's response to that request. If either of you have any questions about this message, please feel free to contact me at (916) 322-5858.

Regards,

Mike McQuinn

Michael P. McQuinn
Assistant General Counsel
California Department of Business Oversight

Ph: (916) 322-5858
Fax: (916) 322-1559

✓

Think

Think Computer Corporation
884 College Avenue
Palo Alto, CA 94306

telephone +1 415 670 9350
fax +1 415 373 3959
web http://www.thinkcomputer.com

June 24, 2013

Department of Financial Institutions
General Counsel
1810 13th Street
Sacramento, CA 95811-7118

RECORDS REQUEST

Dear Records Request Officer:

Pursuant to the California Public Records Act, I request access to and digital copies of all documents, including electronic mail messages, pertaining to:

1. Each and every cease and desist order the DFI has sent regarding the California Money Transmission Act;
2. Communications between the DFI and the California legislature regarding AB 786.

I will not pay for shipping of these documents, as no photocopying should be necessary for digital files. **Please send all documents by e-mail to legal@thinkcomputer.com.** If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act.

Thank you for your assistance.

Sincerely,

Aaron Greenspan

Aaron Greenspan
President & CEO
Think Computer Corporation

From:	Lehtonen, Tony@DBO
Sent:	Tuesday, July 09, 2013 4:33 PM
To:	Swickard, Inna@DBO
Subject:	FW: Recent order issued by the commissioner
Attachments:	Recent orders of the Commissioner.pdf

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:40 AM
To: Lehtonen,Tony@DBO
Subject: FW: Recent order issued by the commissioner

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Thursday, June 06, 2013 1:28 PM
To: 'Farouk, Mark'
Subject: Recent order issued by the commissioner

Mark,

I've attached a PDF of recent orders issued by the Commissioner regarding the MTA. They also are available on our website at: http://www.dfi.ca.gov/Laws/DFI_Final_Orders.html

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

McGuffin, Matthew@DBO

From:	Lehtonen, Tony@DBO
Sent:	Tuesday, July 09, 2013 4:33 PM
To:	Swickard, Inna@DBO
Subject:	FW: Proposed amendments May 13 2013 (2).doc

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:38 AM
To: Lehtonen,Tony@DBO
Subject: FW: Proposed amendments May 13 2013 (2).doc

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Thursday, May 16, 2013 10:53 AM
To: 'Farouk, Mark'
Subject: RE: Proposed amendments May 13 2013 (2).doc

Thanks Mark. Is it okay if I share this with Eileen Newall?

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions

1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Farouk, Mark [mailto:Mark.Farouk@asm.ca.gov]
Sent: Thursday, May 16, 2013 10:26 AM
To: Davis, Marilyn@DFI
Cc: ronda.paschal@bth.ca.gov
Subject: Proposed amendments May 13 2013 (2).doc

Marilyn,

Attached is a mock-up of proposed amendments that are under consideration for AB 786. I'm sharing these before I have final sign-off from the Chair, but I want to give you heads up on the direction we are going.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

McGuffin, Matthew@DBO

From:	Lehtonen, Tony@DBO
Sent:	Tuesday, July 09, 2013 4:34 PM
To:	Swickard, Inna@DBO
Subject:	FW: AB 786 Money Transmission

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:29 AM
To: Lehtonen,Tony@DBO
Subject: FW: AB 786 Money Transmission

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Wednesday, May 15, 2013 9:28 AM
To: 'Newhall, Eileen'
Subject: RE: AB 786 Money Transmission

Your draft analysis of AB 978 looks okay to me. I don't see anything that is incorrect of misleading and the amendments you are recommending would improve the bill.

Marilyn S. Davis, CPA
Legislative Deputy

Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Newhall, Eileen [mailto:Eileen.Newhall@SEN.CA.GOV]
Sent: Tuesday, May 14, 2013 6:26 PM
To: Davis, Marilyn@DFI
Subject: Re: AB 786 Money Transmission

Thanks a ton! Super helpful. Any thoughts on the 978 analysis? Incorrect or misleading statements? Amendment recommendations with which you disagree?

From: Davis, Marilyn@DFI [mailto:Marilyn.Davis@DFI.CA.GOV]
Sent: Tuesday, May 14, 2013 05:51 PM
To: Newhall, Eileen
Subject: AB 786 Money Transmission

Eileen,

Current FC Sec. 2040 requires each licensee to maintain tangible shareholders' equity in an amount the commissioner determines adequate, but no less than $500,000. Tangible shareholders' equity (TSE) is determined by reducing shareholders' or members' equity by the amount of intangible assets. TSE has been the standard by which we evaluate a licensee's capital adequacy, because if we must close and liquidate a licensee, at that point, intangibles generally have no value.

Of the 70 current licensees, 6 have TSE over $500,000, but less than $1 million. Another 14 have TSE between $1 million and $2 million. AB 786 would cap the equity requirement at $2 million. Of the 50 remaining licensees, 25 have TSE between $2 million and $10 million; 14 are between $10 million and $ 50 million; 5 are between $50 million and $100 million; and 6 are over $100 million. Twenty-eight licensees carry intangibles on their balance sheets and 11 of those have intangibles that total more than 50% of their shareholders' equity.

The enforcement provisions in AB 786 are duplicative of FC 566 in Division 1, which applies to all of the laws administered by DFI. While there is nothing in the Financial Code that limits the commissioner's authority to bring an action, DFI is subject to Government Code Section 11040 et seq, that generally requires state agencies to employ the Attorney General to represent them in legal matters. Generally, for judicial, not administrative, matters, the Attorney General would represent DFI. But there have been instances when DFI has requested and received a waiver from the AG to use in-house counsel.

Let me know if this answers your questions or if you need more information.

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
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marilyn.davis@dfi.ca.gov

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McGuffin, Matthew@DBO

From:	Lehtonen, Tony@DBO
Sent:	Tuesday, July 09, 2013 4:33 PM
To:	Swickard, Inna@DBO
Subject:	FW: Proposed amendments May 13 2013 (2).doc
Attachments:	Proposed amendments May 13 2013 (2).doc

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:39 AM
To: Lehtonen,Tony@DBO
Subject: FW: Proposed amendments May 13 2013 (2).doc

I'm not sure if I sent you Mark's mock-up for proposed amendments. It's attached to this e-mail from Mark.

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Thursday, May 16, 2013 10:28 AM
To: Venchiarutti, Robert@DFI
Cc: Barnes, Teveia@DFI; Murphy, Tara
Subject: FW: Proposed amendments May 13 2013 (2).doc

This just arrived from Mark Farouk. I haven't read it yet.

Marilyn S. Davis, CPA

Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Farouk, Mark [mailto:Mark.Farouk@asm.ca.gov]
Sent: Thursday, May 16, 2013 10:26 AM
To: Davis, Marilyn@DFI
Cc: ronda.paschal@bth.ca.gov
Subject: Proposed amendments May 13 2013 (2).doc

Marilyn,

Attached is a mock-up of proposed amendments that are under consideration for AB 786. I'm sharing these before I have final sign-off from the Chair, but I want to give you heads up on the direction we are going.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

McGuffin, Matthew@DBO

From: Lehtonen, Tony@DBO
Sent: Tuesday, July 09, 2013 4:34 PM
To: Swickard, Inna@DBO
Subject: FW: American Express Reports is 100% Eligible Securities

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:31 AM
To: Lehtonen,Tony@DBO
Subject: FW: American Express Reports is 100% Eligible Securities

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Wednesday, March 13, 2013 12:12 PM
To: 'Farouk, Mark'; 'Newhall, Eileen'
Subject: FW: American Express Reports is 100% Eligible Securities

Commissioner Barnes asked me to pass this information on to you both.

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Barnes, Teveia@DFI
Sent: Wednesday, March 13, 2013 11:25 AM
To: Kelly, Brian P.@BTH; 'Farris, Carol@BTH'; 'Paschal, Ronda K.@BTH'
Cc: Davis, Marilyn@DFI; Venchiarutti, Robert@DFI; Murphy, Tara; Rumberger, Jennifer@DFI; Wong, Wallace@DFI
Subject: American Express Reports is 100% Eligible Securities

California does indeed provide better protections under the CA MTA than all other states. In light of a recent Pew Charitable Trust Report on the limited protections afforded by many state laws regulating stored valued/prepaid cards, American Express, a DFI licensee, informed the New York Times that AmEx holds eligible securities equal to 100% of all of its stored value and money transmission in the United States. The CA MTA is ahead of all other states in terms of the overall protections it affords people in California.

> March 13, 2013: "In an e-mail, an American Express spokeswoman, Vanessa McCutchen, said the company's prepaid cards were backed by American Express Travel Related Services Company Inc., which has a long history of issuing payment products. "Our prepaid cards are also issued pursuant to comprehensive state money transmitter regulations," she said. "These regulations require that American Express hold assets to back up 100 percent of all funds in accounts at all times."

Please read the entire New York Times' "Bucks" article picked up that discusses the report from Pew Charitable Trusts that notes prepaid cards' lack of the types of protection afforded to checking accounts and calls on regulators to "establish a level playing field for all deposit products that protects consumers rather than allowing companies to choose less-stringent regulations." The full report is available here.

Take care,
Teveia

Teveia R. Barnes
Commissioner
Department of Financial Institutions
45 Fremont Street, Suite 1700
San Francisco, California 94105
415-263-8501 voice
415-288-8830 fax

McGuffin, Matthew@DBO

From: Lehtonen, Tony@DBO
Sent: Tuesday, July 09, 2013 4:34 PM
To: Swickard, Inna@DBO
Subject: FW: AB 786 Money Transmission

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From: Davis,Marilyn@DBO
Sent: Monday, July 01, 2013 11:27 AM
To: Lehtonen,Tony@DBO
Subject: FW: AB 786 Money Transmission

Marilyn S. Davis, CPA
Legislative Deputy
Department of Business Oversight
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-2123
marilyn.davis@dfi.ca.gov

From: Davis, Marilyn@DFI
Sent: Thursday, May 16, 2013 10:26 AM
To: 'Newhall, Eileen'
Subject: RE: AB 786 Money Transmission

The only thing I've heard from Mark is that he was working on amendment language. That was 2 weeks ago. I thought he was going to have it ready before Assembly Approps, but evidently, he didn't get it done and I have not seen it. From what I've heard through the grapevine, it won't improve the bill.

Marilyn S. Davis, CPA

Legislative Deputy
Department of Financial Institutions
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Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Newhall, Eileen [mailto:Eileen.Newhall@SEN.CA.GOV]
Sent: Thursday, May 16, 2013 10:11 AM
To: Davis, Marilyn@DFI
Subject: RE: AB 786 Money Transmission

Have you or Bob communicated with Mark Farouk about the bill since it was introduced?

From: Davis, Marilyn@DFI [mailto:Marilyn.Davis@DFI.CA.GOV]
Sent: Thursday, May 16, 2013 10:10 AM
To: Newhall, Eileen
Subject: RE: AB 786 Money Transmission

Eileen,

Just wanted to let you know that I'm working on setting up the call. I'm waiting for Bob to get back to me about a time on Monday.

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Newhall, Eileen [mailto:Eileen.Newhall@SEN.CA.GOV]
Sent: Thursday, May 16, 2013 9:26 AM
To: Davis, Marilyn@DFI
Subject: RE: AB 786 Money Transmission

I would. Monday morning is great. Anytime from 9:30 on. Just let me know what time works for you two.

From: Davis, Marilyn@DFI [mailto:Marilyn.Davis@DFI.CA.GOV]
Sent: Thursday, May 16, 2013 9:24 AM
To: Newhall, Eileen
Subject: RE: AB 786 Money Transmission

Eileen,

Bob would like to have phone conversation with you about this. He is available next week, either Monday morning or Wednesday afternoon. The answers regarding required TSE may not be as simple as the breakdown I provided for actual TSE.

Let me know if you would like to set up a call with Bob.

Marilyn S. Davis, CPA
Legislative Deputy
Department of Financial Institutions
1810 13th Street
Sacramento, California 95811-7118
Office: 916-322-1571
Cell: 916-202-9136
Fax: 916-445-7643
marilyn.davis@dfi.ca.gov

From: Newhall, Eileen [mailto:Eileen.Newhall@SEN.CA.GOV]
Sent: Wednesday, May 15, 2013 2:26 PM
To: Davis, Marilyn@DFI
Subject: RE: AB 786 Money Transmission

A couple of questions for you about the paragraph I've highlighted in red, below. Does the TSE the licensees have match DFI's requirement for their TSE? In other words, if we look at the (for example) 14 licenses with TSE between $10M and $50M, has DFI told them they need to have at least $10M in TSE? Or are DFI's requirements lower, and they simply happen to have TSE much higher than their minimum requirement? Can I get a breakdown of DFI's current TSE requirements? IOW, xx licensees are required to have TSE of at least $500,000, yy licensees are required to have TSE of at least $1 million, zz licensees are required to have TSE of at least $2 million, etc?

From: Davis, Marilyn@DFI [mailto:Marilyn.Davis@DFI.CA.GOV]
Sent: Tuesday, May 14, 2013 5:51 PM
To: Newhall, Eileen
Subject: AB 786 Money Transmission

Eileen,

Current FC Sec. 2040 requires each licensee to maintain tangible shareholders' equity in an amount the commissioner determines adequate, but no less than $500,000. Tangible shareholders' equity (TSE) is determined by reducing shareholders' or members' equity by the amount of intangible assets. TSE has been the standard by which we evaluate a licensee's capital adequacy, because if we must close and liquidate a licensee, at that point, intangibles generally have no value.

Of the 70 current licensees, 6 have TSE over $500,000, but less than $1 million. Another 14 have TSE between $1 million and $2 million. AB 786 would cap the equity requirement at $2 million. Of the 50 remaining licensees, 25 have TSE between $2 million and $10 million; 14 are between $10 million and $ 50 million; 5 are between $50 million and $100 million; and 6 are over $100 million. Twenty-eight licensees carry intangibles on their balance sheets and 11 of those have intangibles that total more than 50% of their shareholders' equity.

The enforcement provisions in AB 786 are duplicative of FC 566 in Division 1, which applies to all of the laws administered by DFI. While there is nothing in the Financial Code that limits the commissioner's authority to bring an action, DFI is subject to Government Code Section 11040 et seq, that generally requires state agencies to employ the Attorney General to represent them in legal matters. Generally, for judicial, not administrative, matters, the Attorney General would represent DFI. But there have been instances when DFI has requested and received a waiver from the AG to use in-house counsel.

Let me know if this answers your questions or if you need more information.

Marilyn S. Davis, CPA
Legislative Deputy
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1810 13th Street
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McGuffin, Matthew@DBO

From: Owen, Jan Lynn@DBO
Sent: Tuesday, January 14, 2014 11:22 AM
To: 'Farouk, Mark'
Subject: AB 129 proposed amendment

Mark,

I had my staff take a look at the language and, in general, they arrived at the conclusion that the most practical solution would probably be to repeal CC 107 altogether. The statute seems to have outlived its usefulness and we've heard only two other states (Arkansas and Virginia) still have similar laws.

Staff's perspective is the current language is outdated. For instance, what does it mean "to issue or put in circulation?" Can someone other than the issuer put money into circulation? If someone buys something using an alternative currency (e.g., buys a stuffed animal with Disney Dollars), is that person putting that currency into circulation? If any redemption of an alternative currency is for lawful money other than the lawful money of the United States, does that mean that the other lawful money is being circulated or issued when the alternative currency is issued or circulated? If so, CC 107 should already exempt any non-US lawful money that can be issued or circulated upon the exercise of a redemption provision of any alternative money redeemable for lawful money.

Furthermore, "lawful money of the United States" is undefined. The Federal Reserve Act uses the term "lawful money" but does not define it. Questions like these make the law difficult to enforce and, to be perfectly candid, enforcement of CC 107 is no longer taking place.

If you move ahead with amendments to CC 107 we have several questions. Chief among them:

- The amended language requires that alternative currency be redeemable for lawful money. Who redeems it: the issuer? If so, how would virtual currency, such as Bitcoin, be redeemed when there is no issuer? If the alternative currency is not redeemable with lawful money, how would its value be based on lawful money? The valuation methodology would almost certainly require an extensive regulation.

- Regulations would need to be drafted that define critical terms used and the statute would need to be drafted so that unredeemable virtual currency is not excluded. For instance, does the term "alternative currency that is redeemable for lawful money" mean the issuer of the alternative currency must give the holders of the alternative currency a certain amount of U.S. dollars or other lawful money upon demand by the holders of the alternative currency? Or, does the term "redeemable for lawful money" mean the issuer of the alternative currency must provide that the issuer can redeem the outstanding alternative currency by paying the holders of the alternative currency a specified amount of U.S. dollars or other lawful money, such as $0.0001 per bitcoin?

These are some of the questions we have raised in our discussion of AB 129. My staff believe that, as currently drafted, the bill will create new problems and not solve the problems that already exist in the enforcement of CC 107. Our recommendation is that, for the purposes we believe intended, it would be more practical to use AB 129 to repeal CC 107.

Thanks for the opportunity to review and let me know if you have any questions.

Jan Lynn Owen
Commissioner
Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814

916-324-9011

www.dbo.ca.gov

From:	O'Toole, Dave@DBO
Sent:	Monday, January 27, 2014 3:31 PM
To:	Farouk, Mark (Mark.Farouk@asm.ca.gov)
Cc:	Mirrashidi, Lila@DBO; Oseguera, Elizabeth@DBO
Subject:	DBO Bill Proposals
Attachments:	DBO Leg Technical.docx; DBO Leg Money Xmission.docx

Hey Mark-

Just left you a message about this... We'd appreciate your considering these for the committee/Assemblyman's bill package. There's a technical clean-up bill (perhaps for your committee bill) and then a more interesting bill on money transmission receipt. I'm stepping out for meetings for a bit but will be in the rest of the week if you want to discuss. You can also reach Liz Oseguera (cc'ed) at 322-7248.

Thanks for taking a look-

Dave O'Toole
Chief Deputy Commissioner
California Department of Business Oversight
Tel: 916/324-6623
Fax: 916/322-1559

STATE OF CALIFORNIA – BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY
EDMUND G. BROWN JR., Governor

DEPARTMENT OF BUSINESS OVERSIGHT
Ensuring a Fair and Secure Financial Services Marketplace for all Californians

Date: January 27, 2014

Subject: **2014 Legislative Bill Proposal Summary**

BILL SUBJECT: Technical clean-up: erroneous references: state and federal law changes

SUMMARY

This proposal would provide technical corrections and conforming language for various California code sections related to: (1) SB 664 (Committee on Banking and Financial Institutions, Chapter 243, Statues of 2011), which reorganized and renumbered all Financial Code sections related to banks, trust companies and money transmitters; (2) revised federal regulations issued by the Consumer Financial Protection Bureau under authority of the Dodd-Frank Act; and (3) clarify material that licensees are required to file with the commissioner.

IDENTIFICATION OF PROBLEM

SB 664 (Committee on Banking and Financial Institutions, Chapter 243, Statutes of 2011)

Although SB 664 was not sponsored by the administration, DFI provided technical advice to committee staff and Legislative Counsel regarding the logical organization of the Financial Code sections affected. SB 664 completely renumbered sections of the Financial Code related to banking, trust company and money transmitter licensees of DFI. As a result, various statutes contain erroneous references to sections of the Financial Code that were renumbered.

Subsequent legislation has addressed some, but not all, of these incorrect references. In order to avoid confusion, these references should be corrected. For example, sections of the Government Code regarding exemptions under the Public Records Act cite specific section of the Financial which changes as a result of SB 664.

Clarification of Existing Law

Financial Code Section 459, requires every licensee of the Department under the Financial Institutions Law to file with the commissioner one copy of all material filed by the licensee with any applicable federal financial institution regulatory agency, law enforcement agency, or other federal agency. Filing copies of tax returns, 1099s and W2s (to name a few) with the commissioner is not necessary to the Department's mission to ensure the integrity and stability of California's financial services system and imposes an unduly burdensome filing requirement on the licensees.

Federal Legislation: the Dodd-Frank Act and the Consumer Financial Protection Bureau

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), among other things, created the federal Consumer Financial Protection Bureau (CFPB). The CFPB was granted rule-making authority under the Real Estate Settlement Procedures Act of 1974 (RESPA) and the Truth in Lending Act (TILA) and was tasked with harmonizing the rules under RESPA and TILA. In 2013, the CFPB reissued the implementing regulations for RESPA (Regulation X) and TILA (Regulation Z). This reissuance changed the references for Regulation X and Regulation Z in the Code of Federal Regulations (CFR).

The Dodd-Frank Act also abolished the Office of Thrift Supervision (OTS), and transferred its supervisory powers and responsibilities for federally-chartered thrift institutions to the Office of the Comptroller of the Currency (OCC), the national bank regulator.

There are a number of references to Regulation X and Regulation Z in California statutes which should be corrected to avoid confusion and enhance enforcement of California consumer protection laws that reference RESPA, TILA and the implementing regulations. Additionally, since the OTS was abolished, references to the OTS in California codes should be eliminated.

PROPOSED SOLUTION

SB 664

This proposal would correct erroneous code section references created when SB 664 became effective, within:

- Civil Code—Sec. 1798.24;
- Corporations Code—Sec. 163, Sec. 202, Sec. 1800, Sec. 2510, and Sec. 2602;
- Financial Code—Sec. 300, Sec. 1001, Sec. 4970, Sec. 4973, Sec. 14356, Sec. 14254.5, Sec. 14256, and Sec. 30005; and
- Government Code—Sec. 6254.5, and Sec. 7480.

SB 664 inadvertently removed the citation language for the Banking Law from the Financial Code. This proposal would add Sec. 1001 to Division 1.1 of the Financial Code to provide a citation for the Banking Law.

This proposal also would provide updated information for consumers regarding how to contact a HUD-approved housing counseling agency in the "Home Ownership Counseling Notice" required by Sec. 4973 of the Financial Code.

Clarification of Existing Law

The proposal would clarify existing law and reduce the regulatory burden on licensees by limiting the materials that must be filed with the Department.

- Financial Code—Sec. 459

Dodd-Frank Act and the CFPB

This proposal would correct erroneous references to the OTS, which was abolished by the Dodd-Frank Act; the Federal Reserve System and HUD, whose rule-making authority under RESPA and TILA were transferred to the CFPB by the Dodd-Frank Act; and federal Regulations X and Z (implementing RESPA and TILA), which were reissued by the CFPB under different Code of Federal Regulations citations. Corrections would be made within:

- Business and Professions Code—Sec. 11302; and
- Financial Code—Sec. 4000, Sec. 4970, Sec. 4995, Sec. 22332, Sec. 22337, Sec. 22340.1, and Sec. 50003.

JUSTIFICATION

Legislation is needed to correct numerous erroneous references in SB 664, which renumbered the Financial Code sections related to banks, trust companies and money transmitters; and changes in the structure of the federal financial regulatory scheme and reissued federal regulations.

Incorrect references in the codes creates confusion for state employees who must administer the laws, for persons doing business in California under a license issued pursuant to an affected code, and for California consumers doing business with licensed persons.

This proposal will correct erroneous references and help provide for smooth operation of state government, clear responsibilities for licensed entities and clear rights and disclosures for California consumers.

PROGRAM BACKGROUND/LEGISLATIVE HISTORY

SB 664 (Committee on Banking and Financial Institutions, Chapter 243, Statutes of 2011)
SB 664, although not administration sponsored, contained language from a legislative proposal of the former DFI. SB 664 completely renumbered sections of the Financial Code related to banking, trust company and money transmitter licensees of DFI. As a result numerous references in various statutes contain erroneous references to sections of the Financial Code that were renumbered.

Federal Legislation: the Dodd-Frank Act

In response to an unprecedented cycle of expansion and contraction in the mortgage market that sparked the most severe U.S. recession since the Great Depression, Congress passed the Dodd-Frank Act, which was signed into law on July 1, 2010 (Public Law No.111-203). The Dodd-Frank Act, among other things, created the CFPB which was granted rule-making authority under the Real Estate Settlement Procedures Act of 1974 (RESPA) and the Truth in Lending Act (TILA) and was tasked with harmonizing the rules under RESPA and TILA. In 2013, the CFPB reissued the implementing regulations for RESPA (Regulation X) and TILA (Regulation Z). This reissuance changed the references for Regulation X and Regulation Z in the Code of Federal Regulations (CFR).

PROBABLE SUPPORT AND OPPOSITION

The Department does not anticipate any support or opposition to this proposal.

FISCAL IMPACT:

The immediate fiscal impact to the Department would be minor and absorbable. The Department believes any fiscal impact to BRE and BCSH also would be minor and absorbable. Over time, clarifying provisions will help reduce confusion for licensees and consumers and create efficiencies within affected departments or agencies that also would be minor.

ECONOMIC IMPACT

The Department does not anticipate any significant economic impact as a result of this proposal. Promoting efficiencies in government and reducing regulatory burden on licensees by correcting erroneous and confusing references in California Codes may have a minor positive impact on the economy in general.

COMPARISON WITH OTHER STATES

Not applicable

OTHER AFFECTED AGENCIES AND THEIR ROLES/VIEWS

This proposal would also update references to DRE and BTH to BRE and BSCH, respectively.

DRAFT LANGUAGE

The people of the State of California do enact as follows:

Section 1. Section 202 of the Corporations Code is amended to read:

202. The articles of incorporation shall set forth:

(a) The name of the corporation; provided, however, that in order for the corporation to be subject to the provisions of this division applicable to a close corporation (Section 158), the name of the corporation must contain the word "corporation," "incorporated," or "limited" or an abbreviation of one of such words.

(b) (1) The applicable one of the following statements:

(A) The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code; or

(B) The purpose of the corporation is to engage in the profession of ____ (with the insertion of a profession permitted to be incorporated by the California Corporations Code) and any other lawful activities (other than the banking or trust company business) not prohibited to a corporation engaging in such profession by applicable laws and regulations.

(2) In case the corporation is a corporation subject to the Banking Law (Division ~~1~~1.1 (commencing with Section ~~99~~1000) of the Financial Code), the articles shall set forth a statement of purpose which is prescribed in the applicable provision of the Banking Law.

(3) In case the corporation is a corporation subject to the Insurance Code as an insurer, the articles shall additionally state that the business of the corporation is to be an insurer.

(4) If the corporation is intended to be a "professional corporation" within the meaning of the Moscone-Knox Professional Corporation Act (Part 4 (commencing with Section 13400) of Division 3), the articles shall additionally contain the statement required by Section 13404.

The articles shall not set forth any further or additional statement with respect to the purposes or powers of the corporation, except by way of limitation or except as expressly required by any law of this state other than this division or any federal or other statute or regulation (including the Internal Revenue Code and regulations thereunder as a condition of acquiring or maintaining a particular status for tax purposes).

(c) The name and street address in this state of the corporation's initial agent for service of process in accordance with subdivision (b) of Section 1502.

(d) The initial street address of the corporation.

(e) The initial mailing address of the corporation, if different from the initial street address.

(f) If the corporation is authorized to issue only one class of shares, the total number of shares which the corporation is authorized to issue.

(g) If the corporation is authorized to issue more than one class of shares, or if any class of shares is to have two or more series:

(1) The total number of shares of each class the corporation is authorized to issue, and the total number of shares of each series which the corporation is authorized to issue or that the board is authorized to fix the number of shares of any such series;

(2) The designation of each class, and the designation of each series or that the board may determine the designation of any such series; and

(3) The rights, preferences, privileges, and restrictions granted to or imposed upon the respective classes or series of shares or the holders thereof, or that the board, within any limits and restrictions stated, may determine or alter the rights, preferences, privileges, and restrictions granted to or imposed upon any wholly unissued class of shares or any wholly unissued series of any class of shares. As to any series the number of shares of which is authorized to be fixed by the board, the articles may also authorize the board, within the limits and restrictions stated therein or stated in any resolution or resolutions of the board originally fixing the number of shares constituting any series, to increase or decrease (but not below the number of shares of such series then outstanding) the number of shares of any such series subsequent to the issue of shares of that series. In case the number of shares of any series shall be so decreased, the shares constituting such decrease shall resume the status which they had prior to the adoption of the resolution originally fixing the number of shares of such series.

SEC. 2. Section 300 of the Financial Code is amended to read:

300. (a) In this section:

(1) “Business and industrial development corporation” means a corporation licensed under Division 15 (commencing with Section 31000).

(2) “Payment instrument” has the same meaning as set forth in subdivision (q) of Section ~~33059~~2003.

(3) ~~“Traveler’s check”~~ “Stored value” has the same meaning as set forth in subdivision (v) of Section ~~1803~~2003.

(b) There is in the state government, in the Business, Consumer Services, and Housing Agency, a Department of Business Oversight, which has charge of the execution of, among other laws, the laws of this state relating to any of the following: (1) banks or trust companies or the banking or trust business; (2) savings associations or the savings association business; (3) credit unions or the credit union business; (4) persons who engage in the business of receiving money for transmission ~~to foreign nations~~ or such business; (5) issuers of ~~traveler’s checks~~stored value or ~~the traveler’s check~~such business; (6) issuers of payment instruments or the payment instrument business; (7) business and industrial development corporations or the business and industrial development corporation business; (8) insurance premium finance agencies or the insurance premium finance business; (9) persons offering or making any contract constituting bucketing; (10) persons offering or selling off-exchange commodities; (11) deferred deposit originators; (12) finance lenders and brokers; (13) residential mortgage lenders and servicers; (14) capital access companies; (15) check sellers, bill payers, and proraters; (16) securities issuers, broker-dealers, agents, investment advisers, and investment adviser representatives; (17) mortgage loan originators employed or supervised by finance lenders or residential mortgage lenders; (18) escrow agents; (19)

franchisors; or (20) persons holding securities as custodians on behalf of securities owners.

SEC. 3. Section 459 of the Financial Code is amended to read:

459. (a) Every licensee shall file with the commissioner one copy of all material filed by the licensee with (i) any ~~applicable~~ federal ~~financial institutions regulatory~~ agency that is charged with the supervision and regulation of that licensee, or (ii) any law enforcement agency~~, or other federal agency that is required to be filed by law or order of the agency~~.

(b) Each copy required to be filed pursuant to subdivision (a) shall be filed with the commissioner on or before the date upon which the original is filed with the ~~federal regulatory~~ agenc~~y~~ies specified in subdivision (a) and shall be available for inspection by the public except to the extent the information contained therein is accorded confidential treatment under state or federal law or regulations. ~~That material shall be open for inspection by the Attorney General.~~

SEC. 4. Section 1001 is added to the Financial Code to read:

1001. This division is known and may be cited as the "Banking Law."

SEC. 5. Section 1798.24 of the Civil Code is amended to read:

1798.24. No agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the information is disclosed, as follows:

(a) To the individual to whom the information pertains.

(b) With the prior written voluntary consent of the individual to whom the record pertains, but only if that consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent.

(c) To the duly appointed guardian or conservator of the individual or a person representing the individual if it can be proven with reasonable certainty through the possession of agency forms, documents or correspondence that this person is the authorized representative of the individual to whom the information pertains.

(d) To those officers, employees, attorneys, agents, or volunteers of the agency that has custody of the information if the disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired.

(e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.

(f) To a governmental entity when required by state or federal law.

(g) Pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(h) To a person who has provided the agency with advance, adequate written assurance that the information will be used solely for statistical research or reporting purposes, but only if the information to be disclosed is in a form that will not identify any individual.

(i) Pursuant to a determination by the agency that maintains information that compelling circumstances exist that affect the health or safety of an individual, if upon the disclosure notification is transmitted to the individual to whom the information pertains at his or her last known address. Disclosure shall not be made if it is in conflict with other state or federal laws.

(j) To the State Archives as a record that has sufficient historical or other value to warrant its continued preservation by the California state government, or for evaluation by the Director of General Services or his or her designee to determine whether the record has further administrative, legal, or fiscal value.

(k) To any person pursuant to a subpoena, court order, or other compulsory legal process if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law.

(l) To any person pursuant to a search warrant.

(m) Pursuant to Article 3 (commencing with Section 1800) of Chapter 1 of Division 2 of the Vehicle Code.

(n) For the sole purpose of verifying and paying government health care service claims made pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code.

(o) To a law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.

(p) To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing.

(q) To an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that the information does not include or reveal the identity of the natural parents.

(r) To a child or a grandchild of an adopted person and disclosure is limited to medically necessary information pertaining to the adopted person's natural parents. However, the information, or the process for obtaining the information, shall not include or reveal the identity of the natural parents. The State Department of Social Services shall adopt regulations governing the release of information pursuant to this subdivision by July 1, 1985. The regulations shall require licensed adoption agencies to provide the same services provided by the department as established by this subdivision.

(s) To a committee of the Legislature or to a Member of the Legislature, or his or her staff when authorized in writing by the member, where the member has permission to obtain the information from the individual to whom it pertains or where the member provides reasonable assurance that he or she is acting on behalf of the individual.

(t) (1) To the University of California, a nonprofit educational institution, or, in the case of education-related data, another nonprofit entity, conducting scientific research, provided the request for information is approved by the Committee for the Protection of Human Subjects (CPHS) for the California Health and Human Services Agency (CHHSA) or an institutional review board, as authorized in paragraphs (4) and (5). The approval required under this subdivision shall include a review and determination that all the following criteria have been satisfied:

(A) The researcher has provided a plan sufficient to protect personal information from improper use and disclosures, including sufficient administrative, physical, and technical safeguards to protect personal information from reasonable anticipated threats to the security or confidentiality of the information.

(B) The researcher has provided a sufficient plan to destroy or return all personal information as soon as it is no longer needed for the research project, unless the researcher has demonstrated an ongoing need for the personal information for the research project and has provided a long-term plan sufficient to protect the confidentiality of that information.

(C) The researcher has provided sufficient written assurances that the personal information will not be reused or disclosed to any other person or entity, or used in any manner, not approved in the research protocol, except as required by law or for authorized oversight of the research project.

(2) The CPHS or institutional review board shall, at a minimum, accomplish all of the following as part of its review and approval of the research project for the purpose of protecting personal information held in agency databases:

(A) Determine whether the requested personal information is needed to conduct the research.

(B) Permit access to personal information only if it is needed for the research project.

(C) Permit access only to the minimum necessary personal information needed for the research project.

(D) Require the assignment of unique subject codes that are not derived from personal information in lieu of social security numbers if the research can still be conducted without social security numbers.

(E) If feasible, and if cost, time, and technical expertise permit, require the agency to conduct a portion of the data processing for the researcher to minimize the release of personal information.

(3) Reasonable costs to the agency associated with the agency's process of protecting personal information under the conditions of CPHS approval may be billed to the researcher, including, but not limited to, the agency's costs for conducting a portion of the data processing for the researcher, removing personal information, encrypting or otherwise securing personal information, or assigning subject codes.

(4) The CPHS may enter into written agreements to enable other institutional review boards to provide the data security approvals required by this subdivision, provided the data security requirements set forth in this subdivision are satisfied.

(5) Pursuant to paragraph (4), the CPHS shall enter into a written agreement with the institutional review board established pursuant to Section 49079.5 of the Education Code. The agreement shall authorize, commencing July 1, 2010, or the date upon which the written agreement is executed, whichever is later, that board to provide the data security approvals required by this subdivision, provided the data security requirements set forth in this subdivision and the act specified in paragraph (1) of subdivision (a) of Section 49079.5 are satisfied.

(u) To an insurer if authorized by Chapter 5 (commencing with Section 10900) of Division 4 of the Vehicle Code.

(v) Pursuant to Section ~~280~~450, ~~282~~452, 8009, or 18396 of the Financial Code.

This article shall not be construed to require the disclosure of personal information to the individual to whom the information pertains when that information may otherwise be withheld as set forth in Section 1798.40.

SEC. 6. Section 1800 of the Corporations Code is amended to read:

1800. (a) A verified complaint for involuntary dissolution of a corporation on any one or more of the grounds specified in subdivision (b) may be filed in the superior court of the proper county by any of the following persons:

(1) One-half or more of the directors in office.

(2) A shareholder or shareholders who hold shares representing not less than 33 1/3 percent of (i) the total number of outstanding shares (assuming conversion of any preferred shares convertible into common shares) or (ii) the outstanding common shares or (iii) the equity of the corporation, exclusive in each case of shares owned by persons who have personally participated in any of the transactions enumerated in paragraph (4) of subdivision (b), or any shareholder or shareholders of a close corporation.

(3) Any shareholder if the ground for dissolution is that the period for which the corporation was formed has terminated without extension thereof.

(4) Any other person expressly authorized to do so in the articles.

(b) The grounds for involuntary dissolution are that:

(1) The corporation has abandoned its business for more than one year.

(2) The corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business can no longer be conducted to advantage or so that there is danger that its property and business will be impaired or lost, and the holders of the voting shares of the corporation are so divided into factions that they cannot elect a board consisting of an uneven number.

(3) There is internal dissension and two or more factions of shareholders in the corporation are so deadlocked that its business can no longer be conducted with advantage to its shareholders or the shareholders have failed at two consecutive annual meetings at which all voting power was exercised, to elect successors to directors whose terms have expired or would have expired upon election of their successors.

(4) Those in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders or its property is being misapplied or wasted by its directors or officers.

(5) In the case of any corporation with 35 or fewer shareholders (determined as provided in Section 605), liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders.

(6) The period for which the corporation was formed has terminated without extension of such period.

(c) At any time prior to the trial of the action any shareholder or creditor may intervene therein.

(d) This section does not apply to any corporation subject to the Banking Law (Division ~~1~~1.1 (commencing with Section ~~99~~1000) of the Financial Code), the Public Utilities Act (Part 1 (commencing with 201) of Division 1 of the Public Utilities Code), the Savings ~~and Loan~~ Association Law (Division 2 (commencing with Section 5000) of the Financial Code) or Article 14 (commencing with Section 1010) of Chapter 1 of Part 2 of Division 1 of the Insurance Code.

(e) For the purposes of this section, "shareholder" includes a beneficial owner of shares who has entered into an agreement under Section 300 or 706.

SEC. 7. Section 2602 of the Corporations Code is amended to read:

2602. The articles of incorporation shall set forth:

(a) The name of the flexible purpose corporation that shall contain the words "flexible purpose corporation" or an abbreviation of those words.

(b) (1) Either of the following statements, as applicable:

(A) "The purpose of this flexible purpose corporation is to engage in any lawful act or activity for which a flexible purpose corporation may be organized under Division 1.5 of the California Corporations Code, other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code, for the benefit of the long-term and the short-term interests of the flexible purpose corporation and its shareholders and in furtherance of the following enumerated purposes ____."

(B) "The purpose of this flexible purpose corporation is to engage in the profession of ____ (with the insertion of a profession permitted to be incorporated by the California Corporations Code) and any other lawful activities, other than the banking or trust company business, not prohibited to a flexible purpose corporation engaging in that profession by applicable laws and regulations, for the benefit of the long-term and the short-term interests of the flexible purpose corporation and its shareholders."

(2) A statement that a purpose of the flexible purpose corporation is to engage in one or more of the following purposes, in addition to the purpose stated pursuant to paragraph (1):

(A) One or more charitable or public purpose activities that a nonprofit public benefit corporation is authorized to carry out.

(B) The purpose of promoting positive short-term or long-term effects of, or minimizing adverse short-term or long-term effects of, the flexible purpose corporation's activities upon any of the following:

(i) The flexible purpose corporation's employees, suppliers, customers, and creditors.

(ii) The community and society.

(iii) The environment.

(3) A statement that the flexible purpose corporation is organized as a flexible purpose corporation under the Corporate Flexibility Act of 2011.

(4) If the flexible purpose corporation is a flexible purpose corporation subject to the Banking Law (Division ~~1~~1.1 (commencing with Section ~~99~~1000) of the Financial Code), the articles shall set forth a statement of purpose that is prescribed by the applicable provision of the Banking Law (Division ~~1~~1.1 (commencing with Section ~~99~~1000) of the Financial Code).

(5) If the flexible purpose corporation is a flexible purpose corporation subject to the Insurance Code as an insurer, the articles shall additionally state that the business of the flexible purpose corporation is to be an insurer.

(6) If the flexible purpose corporation is intended to be a professional corporation within the meaning of the Moscone-Knox Professional Corporation Act (Part 4 (commencing with Section 13400) of Division 3), the articles shall additionally contain the statement required by Section 13404. The articles shall not set forth any further or additional statement with respect to the purposes or powers of the flexible purpose corporation, except by way of limitation or except as expressly required by any law of

this state, other than this division, or any federal or other statute or regulation, including the Internal Revenue Code and regulations thereunder as a condition of acquiring or maintaining a particular status for tax purposes.

(7) If the flexible purpose corporation is a close flexible purpose corporation, a statement as required by subdivision (a) of Section 158.

(c) The name and street address in this state of the flexible purpose corporation's initial agent for service of process in accordance with subdivision (b) of Section 1502.

(d) The initial street address of the corporation.

(e) The initial mailing address of the corporation, if different from the initial street address.

(f) If the flexible purpose corporation is authorized to issue only one class of shares, the total number of shares that the flexible purpose corporation is authorized to issue.

(g) If the flexible purpose corporation is authorized to issue more than one class of shares, or if any class of shares is to have two or more series, the articles shall state:

(1) The total number of shares of each class that the flexible purpose corporation is authorized to issue and the total number of shares of each series that the flexible purpose corporation is authorized to issue or that the board is authorized to fix the number of shares of any such series.

(2) The designation of each class and the designation of each series or that the board may determine the designation of any such series.

(3) The rights, preferences, privileges, and restrictions granted to or imposed upon the respective classes or series of shares or the holders thereof, or that the board, within

any limits and restrictions stated, may determine or alter the rights, preferences, privileges, and restrictions granted to or imposed upon any wholly unissued class of shares or any wholly unissued series of any class of shares. As to any series the number of shares of which is authorized to be fixed by the board, the articles may also authorize the board, within the limits and restrictions stated in the article or in any resolution or resolutions of the board originally fixing the number of shares constituting any series, to increase or decrease, but not below the number of shares of such series then outstanding, the number of shares of any series subsequent to the issue of shares of that series. If the number of shares of any series shall be so decreased, the shares constituting that decrease shall resume the status which they had prior to the adoption of the resolution originally fixing the number of shares of that series.

SEC. 8. Section 4000 of the Financial Code is amended to read:

4000. (a) For purposes of this division, the following terms have the following meanings:

(1) "Charge cardholder" and "charge card issuer" have the meaning defined in Section 1748.21 of the Civil Code and "charge card" means those cards defined in subdivision (a) of Section 1748.21 of the Civil Code and upon which the full balance is due and payable in each billing cycle.

(2) "Consumer" means a natural person.

(3) "Consumer credit agreement" means any written instrument providing for an extension of unsecured open-end credit for personal, family, or household purposes,

that governs the relationship between a supervised financial organization and one or more consumers.

(4) "Charge card agreement" means the written instrument that creates and governs the relationship between a charge card issuer and one or more consumers.

(5) "Minimum payment" means that amount of money recited on a billing statement for an open-end credit account that must be received by the supervised financial institution by a specified due date.

(6) "Open-end credit" has the meaning set forth in Section ~~226.2~~1026.2 (a)(20) of Regulation Z.

(7) "Regulation Z" means any rule, regulation, or interpretation promulgated by the ~~Board of Governors of the Federal Reserve System~~ Consumer Financial Protection Bureau under the federal Truth in Lending Act, as amended (15 U.S.C. Sec. 1601 et seq.), and any interpretation or approval issued by an official or employee of the ~~Federal Reserve System~~ Consumer Financial Protection Bureau duly authorized by the ~~board~~ bureau Director under the Truth in Lending Act, as amended, to issue interpretations or approvals.

(8) "Security interest" has the meaning set forth in Section ~~226.2~~1026.2 (a)(25) of Regulation Z.

(9) "Supervised financial organization" means a state or federally regulated bank, savings association, savings bank, or credit union, or a subsidiary of any of the above.

(10) "Unsecured" means that the supervised financial organization is not granted a security interest in personal or real property under the consumer credit agreement.

(b) Notwithstanding any other provisions of law, the definitions contained in this section shall control transactions governed by this division.

SEC. 9. Section 4970 of the Financial Code is amended to read:

4970. For purposes of this division:

(a) "Annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth in Lending Act and the regulations adopted thereunder by the ~~Federal Reserve Board~~Consumer Financial Protection Bureau.

(b) "Covered loan" means a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions are met:

(1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

(2) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.

(c) "Points and fees" shall include the following:

(1) All items required to be disclosed as finance charges under Sections ~~226.4~~1026.4(a) and ~~226.4~~1026.4(b) of Title 12 of the Code of Federal Regulations, including the Official Staff Commentary, as amended from time to time, except interest.

(2) All compensation and fees paid to mortgage brokers in connection with the loan transaction.

(3) All items listed in Section ~~226.4~~1026.4(c)(7) of Title 12 of the Code of Federal Regulations, only if the person originating the covered loan receives direct compensation in connection with the charge.

(d) "Consumer loan" means a consumer credit transaction that is secured by real property located in this state used, or intended to be used or occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential unit. "Consumer loan" does not include a reverse mortgage, an open line of credit as defined in Part ~~226~~1026 of Title 12 of the Code of Federal Regulations (Regulation Z), or a consumer credit transaction that is secured by rental property or second homes. "Consumer loan" does not include a bridge loan. For purposes of this division, a bridge loan is any temporary loan, having a maturity of one year or less, for the purpose of acquisition or construction of a dwelling intended to become the consumer's principal dwelling.

(e) "Original principal balance" means the total initial amount the consumer is obligated to repay on the loan.

(f) "Licensing agency" shall mean the Bureau of Real Estate for licensed real estate brokers, the Department of Business Oversight for licensed residential mortgage lenders, licensed finance lenders and brokers, and ~~the~~ commercial and industrial banks, ~~and~~ savings associations and credit unions organized in this state.

(g) "Licensed person" means a real estate broker licensed under the Real Estate Law (Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code), a finance lender or broker licensed under the California Finance Lenders Law (Division 9 (commencing with Section 22000)), a residential mortgage lender licensed under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000)), a commercial or industrial bank organized under the Banking Law (Division ~~1~~1.1 (commencing with Section ~~99~~1000)), a savings association organized under the Savings Association Law (Division 2 (commencing with Section 5000)), and a credit union organized under the California Credit Union Law (Division 5 (commencing with Section 14000)). This division shall not be construed to prevent any enforcement by a governmental entity against any person who originates a loan and who is exempt or excluded from licensure by all of the licensing agencies, based on a violation of any provision of this division. This division shall not be construed to prevent the Bureau of Real Estate from enforcing this division against a licensed salesperson employed by a licensed real estate broker as if that salesperson were a licensed person under this division. A licensed person includes any person engaged in the practice of consumer lending, as defined in this division, for which a license is required under any other provision of law, but whose license is invalid, suspended or revoked, or where no license has been obtained.

(h) "Originate" means to arrange, negotiate, or make a consumer loan.

(i) “Servicer” has the same meaning provided in Section 6 (i)(2) of the Real Estate Settlement Procedures Act of 1974.

SEC. 10. Section 4973 of the Financial Code is amended, to read:

4973. The following are prohibited acts and limitations for covered loans:

(a) (1) A covered loan shall not include a prepayment fee or penalty after the first 36 months after the date of consummation of the loan.

(2) A covered loan may include a prepayment fee or penalty up to the first 36 months after the date of consummation of the loan if:

(A) The person who originates the covered loan has also offered the consumer a choice of another product without a prepayment fee or penalty.

(B) The person who originates the covered loan has disclosed in writing to the consumer at least three business days prior to loan consummation the terms of the prepayment fee or penalty to the consumer for accepting a covered loan with the prepayment penalty and the rates, points, and fees that would be available to the consumer for accepting a covered loan without a prepayment penalty.

(C) The person who originates the covered loan has limited the amount of the prepayment fee or penalty to an amount not to exceed the payment of six months' advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount.

(D) A covered loan will not impose the prepayment fee or penalty if the covered loan is accelerated as a result of default.

(E) The person who originates the covered loan will not finance a prepayment penalty through a new loan that is originated by the same person.

(b) (1) A covered loan with a term of 5 years or less may not provide at origination for a payment schedule with regular periodic payments that when aggregated do not fully amortize the principal balance as of the maturity date of the loan.

(2) For a payment schedule that is adjusted to account for the seasonal or irregular income of the consumer, the total installments in any year shall not exceed the amount of one year's worth of payments on the loan. This prohibition does not apply to a bridge loan. For purposes of this paragraph, "bridge loan" means a loan with a maturity of less than 18 months that only requires payments of interest until the time when the entire unpaid balance is due and payable.

(c) A covered loan shall not contain a provision for negative amortization such that the payment schedule for regular monthly payments causes the principal balance to increase, unless the covered loan is a first mortgage and the person who originates the loan discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan.

(d) A covered loan shall not include terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds.

(e) A covered loan shall not contain a provision that increases the interest rate as a result of a default. This provision does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration for the indebtedness.

(f) (1) A person who originates covered loans shall not make or arrange a covered loan unless at the time the loan is consummated, the person reasonably believes the consumer, or consumers, when considered collectively in the case of multiple consumers, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation shall be based upon the fully indexed rate of the loan calculated at the time of application.

The consumer shall be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means.

(2) No presumption of inability to make the scheduled payments to repay the obligation shall arise solely from the fact that at the time the loan is consummated, the

consumer's total monthly debts, including amounts owed under the loan, exceed 55 percent of the consumer's monthly gross income.

(3) In the case of a stated income loan, the reasonable belief requirement in paragraph (1) shall apply, however, for stated income loans that belief may be based on the income stated by the consumer, and other information in the possession of the person originating the loan after the solicitation of all information that the person customarily solicits in connection with loans of this type. A person shall not knowingly or willfully originate a covered loan as a stated income loan with the intent, or effect, of evading the provisions of this subdivision.

(g) A person who originates a covered loan shall not pay a contractor under a home-improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with terms and conditions established in a written escrow agreement signed by the consumer, the person who originates a covered loan, and the contractor prior to the disbursement of funds. No payments, other than progress payments for home-improvement work that the consumer certifies is completed, shall be made to an escrow account or jointly to the consumer and the contractor unless the person who originates the loan is presented with a signed and dated completion certificate by the consumer showing that the home-improvement contract was completed to the satisfaction of the consumer.

(h) It is unlawful for a person who originates a covered loan to recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt.

(i) A covered loan shall not contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply if repayment of the loan has been accelerated in accordance with the terms of the loan documents (1) as a result of the consumer's default, (2) pursuant to a due-on-sale provision, or (3) due to fraud or material misrepresentation by a consumer in connection with the loan or the value of the security for the loan.

(j) A person who originates a covered loan shall not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation or cash out, that does not result in an identifiable benefit to the consumer, considering the consumer's stated purpose for seeking the loan, fees, interest rates, finance charges, and points.

(k) (1) A covered loan shall not be made unless the following disclosure, written in 12-point font or larger, has been provided to the consumer no later than three business days prior to signing of the loan documents of the transaction:

CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE

If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

Mortgage loan rates and closing costs and fees vary based on many other factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. Higher rates and fees may be justified depending on the individual circumstances of a particular consumer's application. You should shop around and compare loan rates and fees.

This particular loan may have a higher rate and total points and fees than other mortgage loans and is, or may be, subject to the additional disclosure and substantive protections under Division ~~1.6~~ 1.7 (commencing with Section 4970 of the Financial Code. You should consider consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed. For information on contacting a qualified credit counselor, ask your lender or call the United States Department of Housing and Urban Development's counseling hotline at ~~1-888-466-3487~~ 1-888-995-HOPE (4673) or go to ~~www.hud.gov/fha/sfh/hcc~~ www.hud.gov/offices/hsg/sfh/hcc/fc/ for a list of HUD-approved housing counseling agencies. ~~counselors.~~

You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application.

If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

Property taxes and homeowner's insurance are your responsibility. Not all lenders provide escrow services for these payments. You should ask your lender about these services.

Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors.

(2) It shall be a rebuttable presumption that a licensed person has met its obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the notice set forth in paragraph (1).

(l) (1) A person who originates a covered loan shall not steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade less favorable than the risk grade that the consumer would qualify for based on that person's then current underwriting guidelines, prudently applied, considering the information available to that person, including the information provided by the consumer.

A person shall not be deemed to have violated this section if the risk grade determination applied to a consumer is reasonably based on the person's underwriting guidelines if it is an appropriate risk grade category for which the consumer qualifies with the person.

(2) If a broker originates a covered loan, the broker shall not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which

the consumer could qualify based on the loan products offered by the persons with whom the broker regularly does business.

(m) A person who originates a covered loan shall not avoid, or attempt to avoid, the application of this division by doing the following:

(1) Structuring a loan transaction as an open-end credit plan for the purpose of evading the provisions of this division when the loan would have been a covered loan if the loan had been structured as a closed end loan.

(2) Dividing any loan transaction into separate parts for the purpose of evading the provisions of this division.

(n) A person who originates a covered loan shall not act in any manner, whether specifically prohibited by this section or of a different character, that constitutes fraud.

SEC. 10. Section 4995 of the Financial Code is amended to read:

4995. The following definitions shall apply for purposes of this division:

(a) "Higher-priced mortgage loan" has the meaning set forth in ~~Part 226~~Section 1026.35 of Title 12 of the Code of Federal Regulations.

(b) "Licensed person" means a real estate broker licensed under the Real Estate Law (Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code), a finance lender or broker licensed under the California Finance Lenders Law (Division 9 (commencing with Section 22000)), a residential mortgage lender licensed under the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000)), a commercial or industrial bank organized under the Banking Law

(Division 1.1 (commencing with Section 1000)), a savings association organized under the Savings Association Law (Division 2 (commencing with Section 5000)), and a credit union organized under the California Credit Union Law (Division 5 (commencing with Section 14000)).

(c) “Mortgage broker” means a licensed person who provides mortgage brokerage services. For purposes of this division, a licensed person who makes home loans is a “mortgage broker,” and subject to the requirements of this division applicable to mortgage brokers, only with respect to transactions in which the licensed person provides mortgage brokerage services.

(d) “Mortgage brokerage services” means arranging or attempting to arrange, as exclusive agent for the borrower or as dual agent for the borrower and lender, for compensation or in expectation of compensation, paid directly or indirectly, a higher-priced mortgage loan made by an unaffiliated third party.

SEC. 11. Section 11302 of the Business and Professions Code is amended to read:

11302. For the purpose of applying this part, the following terms, unless otherwise expressly indicated, shall mean and have the following definitions:

(a) “Department” means the Department of Consumer Affairs.

(b) “Appraisal” means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion in a federally related transaction as to the market value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

The term “appraisal” does not include an opinion given by a real estate licensee or engineer or land surveyor in the ordinary course of his or her business in connection with a function for which a license is required under Chapter 7 (commencing with Section 6700) or Chapter 15 (commencing with Section 8700) of Division 3, or Chapter 3 (commencing with Section 10130) or Chapter 7 (commencing with Section 10500) and the opinion shall not be referred to as an appraisal. This part does not apply to a probate referee acting pursuant to Sections 400 to 408, inclusive, of the Probate Code unless the appraised transaction is federally related.

(c) “Appraisal Foundation” means the Appraisal Foundation that was incorporated as an Illinois not-for-profit corporation on November 30, 1987.

(d) (1) “Appraisal management company” means any person or entity that satisfies all of the following conditions:

(A) Maintains an approved list or lists, containing 11 or more independent contractor appraisers licensed or certified pursuant to this part, or employs 11 or more appraisers licensed or certified pursuant to this part.

(B) Receives requests for appraisals from one or more clients.

(C) For a fee paid by one or more of its clients, delegates appraisal assignments for completion by its independent contractor or employee appraisers.

(2) “Appraisal management company” does not include any of the following, when that person or entity directly contracts with an independent appraiser:

(A) Any bank, credit union, trust company, savings and loan association, or industrial loan company doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States that is authorized to transact business in this state.

(B) Any finance lender or finance broker licensed pursuant to Division 9 (commencing with Section 22000) of the Financial Code, when acting under the authority of that license.

(C) Any residential mortgage lender or residential mortgage servicer licensed pursuant to Division 20 (commencing with Section 50000) of the Financial Code, when acting under the authority of that license.

(D) Any real estate broker licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, when acting under the authority of that license.

(3) "Appraisal management company" does not include any person licensed to practice law in this state who is working with or on behalf of a client of that person in connection with one or more appraisals for that client.

(e) "Appraisal Subcommittee" means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(f) "Controlling person" means one or more of the following:

(1) An officer or director of an appraisal management company, or an individual who holds a 10 percent or greater ownership interest in an appraisal management company.

(2) An individual employed, appointed, or authorized by an appraisal management company that has the authority to enter into a contractual relationship with clients for the

performance of appraisal services and that has the authority to enter into agreements with independent appraisers for the completion of appraisals.

(3) An individual who possesses the power to direct or cause the direction of the management or policies of an appraisal management company.

(g) “Director” or “chief” means the Chief of the Bureau of Real Estate Appraisers.

(h) “Federal financial institutions regulatory agency” means the Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, ~~Office of Thrift Supervision,~~ Federal Home Loan Bank System, National Credit Union Administration, and any other agency determined by the director to have jurisdiction over transactions subject to this part.

(i) “Federally related real estate appraisal activity” means the act or process of making or performing an appraisal on real estate or real property in a federally related transaction and preparing an appraisal as a result of that activity.

(j) “Federally related transaction” means any real estate-related financial transaction which a federal financial institutions regulatory agency engages in, contracts for or regulates and which requires the services of a state licensed real estate appraiser regulated by this part. This term also includes any transaction identified as such by a federal financial institutions regulatory agency.

(k) “License” means any license, certificate, permit, registration, or other means issued by the bureau authorizing the person to whom it is issued to act pursuant to this part within this state.

(*l*) "Licensure" means the procedures and requirements a person shall comply with in order to qualify for issuance of a license and includes the issuance of the license.

(m) "Office" or "bureau" means the Bureau of Real Estate Appraisers.

(n) "Registration" means the procedures and requirements with which a person or entity shall comply in order to qualify to conduct business as an appraisal management company.

(o) "State licensed real estate appraiser" is a person who is issued and holds a current valid license under this part.

(p) "Uniform Standards of Professional Appraisal Practice" are the standards of professional appraisal practice established by the Appraisal Foundation.

(q) "Course provider" means a person or entity that provides educational courses related to professional appraisal practice.

SEC. 12. Section 14254.5 of the Financial Code is amended to read:

14254.5. (a) Except as provided in subdivisions (b) and (c), within 10 business days of opening, closing, or relocating a branch office, a credit union shall notify the commissioner in writing of the action, including the street and mailing addresses of the branch office.

(b) A credit union shall not establish a branch office in another state of the United States without the approval of the governmental authority with jurisdiction to license or charter credit unions in that state. "State" has the meaning set forth in Section ~~146.7~~207.

(c) A credit union shall not establish a branch office in a foreign nation without the prior written approval of the commissioner. "Foreign nation" has the meaning set forth in Section ~~139.3~~175.

SEC. 13. Section 14256 of the Financial Code is amended to read:

14256. (a) If any credit union fails to file with the commissioner any report required by this division on or before the day designated for the filing of the report or, if the time for filing the report is extended by the commissioner, within the extended time, or fails to include in the report any matter required by the commissioner, the failure is grounds for the suspension or revocation of the certificate authorizing the credit union to act as a credit union.

(b) If any credit union fails to file with the commissioner any report required by this division or by any order or regulation of the commissioner, on or before the day designated for the filing of the report or, if the time for filing the report is extended by the commissioner, within the extended time, or fails to include in the report any matter required by the commissioner, the commissioner may order the credit union to pay to the commissioner a civil penalty imposed pursuant to Section ~~216.3~~329.

SEC. 14. Section 14356 of the Financial Code is amended to read:

14356. All expenses of the department in administering this division and other laws relating to credit unions or the credit union business shall be paid out of the Credit

Union Fund; and, except as otherwise provided in Section ~~276~~413 or ~~277~~414, the Credit Union Fund shall be used only for such purposes.

SEC. 15. Section 22332 of the Financial Code is amended to read:

22332. No licensee shall take any note or promise to pay that does not accurately disclose the actual amount of the loan, the time for which it is made, and the agreed rate of charge or the annual percentage rate pursuant to Regulation Z promulgated by the ~~Board of Governors of the Federal Reserve System~~ Consumer Financial Protection Bureau.

SEC. 16. Section 22337 of the Financial Code is amended to read:

22337. Each licensed finance lender shall:

(a) Deliver or cause to be delivered to the borrower, or any one thereof, at the time the loan is made, a statement showing in clear and distinct terms the name, address, and license number of the finance lender and the broker, if any. The statement shall show the date, amount, and maturity of the loan contract, how and when repayable, the nature of the security for the loan, if any, and the agreed rate of charge or the annual percentage rate pursuant to Regulation Z promulgated by the ~~Board of Governors of the Federal Reserve System~~ Consumer Financial Protection Bureau (12 C.F.R. ~~226~~1026).

(b) Obtain from the borrower a signed statement as to whether any person has performed any act as a broker in connection with the making of the loan. If the statement discloses that a broker or other person has participated, then the finance lender shall obtain a full statement of all sums paid or payable to the broker or other person.

The finance lender shall keep these statements for a period of three years from and after the date the loan has been paid in full, or has matured according to its terms, or has been charged off.

(c) Permit payment to be made in advance in any amount on any contract of loan at any time. The licensee may apply the payment first to any agreed prepayment penalty, then to all charges due, including charges at the agreed rate or rates up to the date of payment, not to exceed the applicable maximum rate permitted by this article.

(d) Deliver or cause to be delivered to the person making any cash payment, or to the person who requests a receipt at the time of making any payment, at the time payment is made on account of any loan, a plain and complete receipt showing the total amount received and identifying the loan contract upon which the payment is applied.

(e) Upon repayment of any loan in full, release all security for the loan, endorse and return any certificate of ownership, and cancel or plainly mark "paid" and return to the borrower or person making final payment, any note, mortgage, security agreement, trust deed, assignment, or order signed by the borrower, or an optical image reproduction thereof, except those documents that are a part of the court record in any action, or that have been delivered to a third person for the purpose of carrying out their terms, or a security agreement that secures any other indebtedness of a borrower to the licensee, or original documents otherwise required by law. When a trust deed on real property has been taken as security for a loan that has been subsequently paid in full, a duly executed request for reconveyance shall be delivered to the trustor or trustee for the purpose of recording a reconveyance. A termination statement, furnished to the borrower as provided for in Sections 9512 and 9513 of the Commercial Code, shall be deemed a release of the security when a financing statement has been filed pursuant to Section 9501 of the Commercial Code.

For purposes of this subdivision, an optical image reproduction shall meet all of the following requirements:

(1) The optical image storage media used to store the document shall be nonerasable write once, read many (WORM) optical image media that does not allow changes to the stored document.

(2) The optical image reproduction shall be made consistent with the minimum standards of quality approved by either the National Institute of Standards and Technology or the Association for Information and Image Management.

(3) Written authentication identifying the optical image reproduction as an exact unaltered copy of the note, trust deed, mortgage, security agreement, assignment or order shall be stamped or printed on the optical image reproduction.

(f) Deliver or cause to be delivered to the potential borrower, or any one thereof, at the time the licensee first requires or accepts any signed instrument or the payment of any fee, a statement showing in clear and distinct terms the name, address, and license number of the finance lender and the broker, if any.

SEC. 17. Section 22340.1 of the Financial Code is amended to read:

22340.1. (a) A licensee that is a finance lender may sell to (1) an institutional lender, or (2) an institutional investor described in paragraph (6) of subdivision (b) of Section 22340, promissory notes evidencing the obligation to repay federally related mortgage loans, as defined in Section ~~3500.2~~1024.2 of Title ~~24~~12 of the Code of Federal Regulations, purchased from and made by an institutional lender, and may make agreements for the collection of payments and performance of services with respect to those notes. For purposes of this section, "institutional lender" means any bank, trust company, savings bank or savings and loan association, credit union, industrial loan company or residential mortgage lender doing business under the authority of and in accordance with a license, certificate or charter issued by the United States or this state.

(b) In the absence of agreement to the contrary by the licensee and the institutional investor or institutional lender, all payments received from the collection of payments shall be deposited and maintained in a trust account, and shall be disbursed from the trust account only in accordance with the instructions of the owner of the promissory note.

SEC. 18. Section 30005 of the Financial Code is amended to read:

30005. This division does not apply to:

(a) A securities depository which is operated by a corporation, all of the capital stock (other than directors' qualifying shares, if any) of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, or by a corporation all of the capital stock (other than directors' qualifying shares, if any) of which is held by or for such a wholly owned subsidiary of a registered national securities exchange.

(b) A securities depository which is registered with the Securities and Exchange Commission pursuant to any provision of federal law or which is regulated by the Comptroller of the Currency, the Federal Reserve Board, or the Federal Deposit Insurance Corporation pursuant to any provision of federal law, or which is regulated by the Commissioner of Business Oversight under Division ~~1~~1.1 (commencing with Section 1000) of the Financial Code.

SEC. 19. Section 50003 of the Financial Code is amended to read:

50003. (a) "Annual audit" means a certified audit of the licensee's books, records, and systems of internal control performed by an independent certified public accountant in accordance with generally accepted accounting principles and generally accepted auditing standards.

(b) "Borrower" means the loan applicant.

(c) "Buy" includes exchange, offer to buy, or solicitation to buy.

(d) "Commissioner" means the Commissioner of Business Oversight.

(e) "Control" means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a licensee under this division, whether through voting or through the ownership of voting power of an entity that possesses voting power of the licensee, or otherwise. Control is presumed to exist if a person, directly or indirectly, owns, controls, or holds 10 percent or more of the voting power of a licensee or of an entity that owns, controls, or holds, with power to vote, 10 percent or more of the voting power of a licensee. No person shall be deemed to control a licensee solely by reason of his or her status as an officer or director of the licensee.

(f) "Depository institution" has the same meaning as in Section 3 of the Federal Deposit Insurance Act, and includes any credit union.

(g) "Engage in the business" means the dissemination to the public, or any part of the public, by means of written, printed, or electronic communication or any communication by means of recorded telephone messages or spoken on radio, television, or similar communications media, of any information relating to the making of residential mortgage loans, the servicing of residential mortgage loans, or both. "Engage in the business" also means, without limitation, making residential mortgage loans or servicing residential mortgage loans, or both.

(h) "Federal banking agencies" means the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the National Credit Union Administration, and the Federal Deposit Insurance Corporation.

(i) "In this state" includes any activity of a person relating to making or servicing a residential mortgage loan that originates from this state and is directed to persons outside this state, or that originates from outside this state and is directed to persons inside this state, or that originates inside this state and is directed to persons inside this state, or that leads to the formation of a contract and the offer or acceptance thereof is directed to a person in this state (whether from inside or outside this state and whether the offer was made inside or outside the state).

(j) "Institutional investor" means the following:

(1) The United States or any state, district, territory, or commonwealth thereof, or any city, county, city and county, public district, public authority, public corporation, public entity, or political subdivision of a state, district, territory, or commonwealth of the United States, or any agency or other instrumentality of any one or more of the foregoing, including, by way of example, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

(2) Any bank, trust company, savings bank or savings and loan association, credit union, industrial bank or industrial loan company, personal property broker, consumer finance lender, commercial finance lender, or insurance company, or subsidiary or affiliate of one of the preceding entities, doing business under the authority of or in accordance with a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States.

(3) Trustees of pension, profit-sharing, or welfare funds, if the pension, profit-sharing, or welfare fund has a net worth of not less than fifteen million dollars ($15,000,000), except pension, profit-sharing, or welfare funds of a licensee or its affiliate, self-employed individual retirement plans, or individual retirement accounts.

(4) A corporation or other entity with outstanding securities registered under Section 12 of the federal Securities Exchange Act of 1934 or a wholly owned subsidiary of that corporation or entity, provided that the purchaser represents either of the following:

(A) That it is purchasing for its own account for investment and not with a view to, or for sale in connection with, any distribution of a promissory note.

(B) That it is purchasing for resale pursuant to an exemption under Rule 144A (17 C.F.R. 230.144A) of the Securities and Exchange Commission.

(5) An investment company registered under the Investment Company Act of 1940; or a wholly owned and controlled subsidiary of that company, provided that the purchaser makes either of the representations provided in paragraph (4).

(6) A residential mortgage lender or servicer licensed to make residential mortgage loans under this law or an affiliate or subsidiary of that person.

(7) Any person who is licensed as a securities broker or securities dealer under any law of this state, or of the United States, or any employee, officer, or agent of that person, if that person is acting within the scope of authority granted by that license or an affiliate or subsidiary controlled by that broker or dealer, in connection with a transaction involving the offer, sale, purchase, or exchange of one or more promissory notes secured directly or indirectly by liens on real property or a security representing an ownership interest in a pool of promissory notes secured directly or indirectly by liens on real property, and the offer and sale of those securities is qualified under the California Corporate Securities Law of 1968 or registered under federal securities laws, or exempt from qualification or registration.

(8) A licensed real estate broker selling the loan to an institutional investor specified in paragraphs (1) to (7), inclusive, or paragraph (9) or (10).

(9) A business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 or a small business investment company licensed by the United States Small Business Administration under Section 301(c) or (d) of the small business investment act of 1958.

(10) A syndication or other combination of any of the foregoing entities that is organized to purchase a promissory note.

(11) A trust or other business entity established by an institutional investor for the purpose of issuing or facilitating the issuance of securities representing undivided interests in, or rights to receive payments from or to receive payments primarily from, a pool of financial assets held by the trust or business entity, provided that all of the following apply:

(A) The business entity is not a sole proprietorship.

(B) The pool of assets consists of one or more of the following:

(i) Interest-bearing obligations.

(ii) Other contractual obligations representing the right to receive payments from the assets.

(iii) Surety bonds, insurance policies, letters of credit, or other instruments providing credit enhancement for the assets.

(C) The securities will be either one of the following:

(i) Rated as "investment grade" by Standard and Poor's Corporation or Moody's Investors Service, Inc. "Investment grade" means that the securities will be rated by Standard and Poor's Corporation as AAA, AA, A, or BBB or by Moody's Investors

Service, Inc. as Aaa, Aa, A, or Baa, including any of those ratings with "+" or "—" designation or other variations that occur within those ratings.

(ii) Sold to an institutional investor.

(D) The offer and sale of the securities is qualified under the California Corporate Securities Law of 1968 or registered under federal securities laws, or exempt from qualification or registration.

(k) "Institutional lender" means the following:

(1) The United States or any state, district, territory, or commonwealth thereof, or any city, county, city and county, public district, public authority, public corporation, public entity, or political subdivision of a state, district, territory, or commonwealth of the United States, or any agency or other instrumentality of any one or more of the foregoing, including, by way of example, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

(2) Any bank, trust company, savings bank or savings and loan association, credit union, industrial loan company, or insurance company, or service or investment company that is wholly owned and controlled by one of the preceding entities, doing business under the authority of and in accordance with a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States.

(3) Any corporation with outstanding securities registered under Section 12 of the Securities Exchange Act of 1934 or any wholly owned subsidiary of that corporation.

(4) A residential mortgage lender or servicer licensed to make residential mortgage loans under this law.

(*l*) “Law” means the California Residential Mortgage Lending Act.

(m) “Lender” means a person that (1) is an approved lender for the Federal Housing Administration, Veterans Administration, Farmers Home Administration, Government National Mortgage Association, Federal National Mortgage Association, or Federal Home Loan Mortgage Corporation, (2) directly makes residential mortgage loans, and (3) makes the credit decision in the loan transactions.

(n) “Licensee” means, depending on the context, a person licensed under Chapter 2 (commencing with Section 50120), Chapter 3 (commencing with Section 50130), or Chapter 3.5 (commencing with Section 50140).

(o) “Makes or making residential mortgage loans” or “mortgage lending” means processing, underwriting, or as a lender using or advancing one’s own funds, or making a commitment to advance one’s own funds, to a loan applicant for a residential mortgage loan.

(p) “Mortgage loan,” “residential mortgage loan,” or “home mortgage loan” means a federally related mortgage loan as defined in Section ~~3500.2~~1024.2 of Title ~~24~~12 of the Code of Federal Regulations, or a loan made to finance construction of a one-to-four family dwelling.

(q) “Mortgage servicer” or “residential mortgage loan servicer” means a person that (1) is an approved servicer for the Federal Housing Administration, Veterans Administration, Farmers Home Administration, Government National Mortgage

Association, Federal National Mortgage Association, or Federal Home Loan Mortgage Corporation, and (2) directly services or offers to service mortgage loans.

(r) "Nationwide Mortgage Licensing System and Registry" means a mortgage licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the licensing and registration of licensed mortgage loan originators.

(s) "Net worth" has the meaning set forth in Section 50201.

(t) "Own funds" means (1) cash, corporate capital, or warehouse credit lines at commercial banks, savings banks, savings and loan associations, industrial loan companies, or other sources that are liability items on a lender's financial statements, whether secured or unsecured, or (2) a lender's affiliate's cash, corporate capital, or warehouse credit lines at commercial banks or other sources that are liability items on the affiliate's financial statements, whether secured or unsecured. "Own funds" does not include funds provided by a third party to fund a loan on condition that the third party will subsequently purchase or accept an assignment of that loan.

(u) "Person" means a natural person, a sole proprietorship, a corporation, a partnership, a limited liability company, an association, a trust, a joint venture, an unincorporated organization, a joint stock company, a government or a political subdivision of a government, and any other entity.

(v) "Residential real property" or "residential real estate" means real property located in this state that is improved by a one-to-four family dwelling.

(w) "SAFE Act" means the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (Public Law 110-289).

(x) "Service" or "servicing" means receiving more than three installment payments of principal, interest, or other amounts placed in escrow, pursuant to the terms of a mortgage loan and performing services by a licensee relating to that receipt or the enforcement of its receipt, on behalf of the holder of the note evidencing that loan.

(y) "Sell" includes exchange, offer to sell, or solicitation to sell.

(z) "Unique identifier" means a number or other identifier assigned by protocols established by the Nationwide Mortgage Licensing System and Registry.

(aa) For purposes of Sections 50142, 50143, and 50145, "nontraditional mortgage product" means any mortgage product other than a 30-year fixed rate mortgage.

(ab) For purposes of Section 50141, "expungement" means the subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such individual to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty or dismissing the accusation, information, or indictment. With respect to criminal convictions in another state, that state's definition of expungement will apply.

McGuffin, Matthew@DBO

From: Owen, Jan Lynn@DBO
Sent: Tuesday, April 01, 2014 12:04 PM
To: Farouk, Mark; O'Toole, Dave@DBO
Subject: RE: 2209- Money Transmission

I am out of town in LA on Wednesday and Thursday. Friday or Tuesday? Thanks, Jan

Jan Lynn Owen
Commissioner
California Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814
916-324-9011

www.dbo.ca.gov

From: Farouk, Mark [mailto:Mark.Farouk@asm.ca.gov]
Sent: Tuesday, April 01, 2014 12:03 PM
To: O'Toole, Dave@DBO; Owen, Jan Lynn@DBO
Subject: 2209- Money Transmission

Dave & Jan,

Do you have some time next week (Thursday the 10th would be ideal) to meet with myself and the California Retailers regarding AB 2209. We would like to walk through any concerns the department may have.

Thanks.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

From: Owen, Jan Lynn@DBO
Sent: Thursday, April 10, 2014 10:54 AM
To: 'Farouk, Mark'
Subject: RE: MTA

Yea- you and carbs! Was at the Capitol Garage eating my greens and Jessie asked about you- she even calls you French Toast Man...really?
I am taking next week off, so scheduling some time the week of the 21st works well. I would assume you want to amend some language into your bill? If you have some language get it to me, if we do not already have it so we can look at it and I can be prepared. Does that work? Thanks, Jan

Jan Lynn Owen
Commissioner of Corporations
State of California Department of Corporations
151 K Street Suite 200
Sacramento, California 95814

916-324-9011

www.corp.ca.gov

From: Farouk, Mark [mailto:Mark.Farouk@asm.ca.gov]
Sent: Thursday, April 10, 2014 10:46 AM
To: Owen, Jan Lynn@DBO
Subject: MTA

Jan,

We should get together for my power breakfast soon. ☺

Also, do you have some time in the next couple of weeks to meet on MTA language? Retailers would like to join, as well as Paypal.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

McGuffin, Matthew@DBO

From:	O'Toole, Dave@DBO
Sent:	Wednesday, February 12, 2014 10:24 AM
To:	Farouk, Mark
Cc:	Owen, Jan Lynn@DBO
Subject:	Re: New York regulator moving ahead on bitcoin regulation

Fools rush in. ;)

On Feb 12, 2014, at 9:48 AM, "Farouk, Mark" <Mark.Farouk@asm.ca.gov> wrote:

New York regulator moving ahead on bitcoin regulation

POLITICS, POLITICAL EVENTS, GOVERNMENT, COMMENTARY, OPINION, BITCOIN, MT GOX, CURRENCY,, BITCOIN, ALTER, WORLD, INTERNET, BITCOIN, BITINSTANT, CEO, ARREST, DRUGS, EXCHANGE, FAIELLA, SHREM, POLITICS, NEW YORK, NEW YORK CITY, WASHINGTON DC, US: NEWS, BUSINESS NEWS

Reuters | Tuesday, 11 Feb 2014 | 4:12 PM ET

New York's financial regulator on Tuesday revealed new details on his agency's plans to govern virtual currency firms in the state in order to protect consumers and combat money laundering.

Benjamin Lawsky, superintendent of New York's Department of Financial Services, expects to adopt enhanced consumer disclosure rules, capital requirements and a framework for permissible investments with consumer money.

(*Read more:* Bitcoin falls 20% as Mt Gox highlight bug)

Lawsky has said he plans to issue a "BitLicense" for businesses that use the new currencies, and he intends to provide regulations this year, which could make New York the first U.S. state to regulate virtual currencies such as bitcoins.

In a speech in Washington on Tuesday, Lawsky said consumers need to know that virtual currency transactions are generally irreversible, and that they could lose their principal if they hold onto bitcoins for an extended period.

Lawsky said more challenging questions include what capital requirements firms must have on balance sheets to absorb unexpected losses, and how many risks they can take with investments using consumer money. One issue is whether the firms should be allowed to invest in virtual currencies.

"Our objective is to provide appropriate guard rails to protect consumers and root out money laundering—without stifling beneficial innovation," Lawsky said in prepared remarks for an event at the New America Foundation.

(*Read more*: Bitcoin could alter world as much as Internet: VC)

His agency is still wrestling with whether to ban or restrict the use of "tumblers," which obscure the record and source of virtual currencies. He said tumblers are a concern to law enforcement, but that they might have legitimate uses.

He said most virtual currencies have public ledgers which, when combined with know-your-customer guidelines, could serve as anti-money laundering controls.

Lawsky added that he is grappling with what types of firms and transactions to regulate.

The remarks follow two days of hearings in New York on the potential regulation of virtual currencies. Witnesses at the late January hearings included state and federal prosecutors, as well as industry participants such as the investor twins Cameron and Tyler Winklevoss.

Lawsky said the hearings, which were streamed on the agency's website, were watched by more than 14,000 people from 117 countries.

He spoke on Tuesday at an event hosted by "Future Tense," a partnership between Slate magazine, the New America Foundation and Arizona State University to explore emerging technologies.

Separately, Canada announced it will toughen rules targeting money laundering and terrorist financing to keep a closer eye on the use of Bitcoin and other virtual currencies, the government revealed in the federal budget on Tuesday. Online casinos will also be brought into the government's existing money laundering rules, the federal government said.

Bitstamp halts withdrawals

Meanwhile, a second bitcoin exchange halted customer withdrawals on Tuesday amid concerns about a software problem affecting the virtual currency's infrastructure.

Bitstamp, one of the largest exchanges for trading the digital bitcoin currency, said it had halted withdrawals on its platform after discovering "inconsistent results reported" by its bitcoin wallet, which it attributed to a denial-of-service attack.

Slovenia-based Bitstamp is now the second major bitcoin exchange to halt customer withdrawals in the past several days, rattling participants in the nascent market. Last Friday, Tokyo-based Mt. Gox halted withdrawals and has yet to restart them, a development that sent bitcoin prices spiraling lower.

(*Read more:* Bitcoin bust: CEO of currency exchange arrested)

In a statement posted Tuesday on its website, Bitstamp said withdrawals that failed on Monday and Tuesday would be canceled, and "the amounts added back to the customer account balances."

On Bitstamp's exchange, the bitcoin price was quoted at about $645, down about 6 percent on the day.

--By Reuters

Mark Farouk
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STATE OF CALIFORNIA – BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY
EDMUND G. BROWN JR., Governor

DEPARTMENT OF BUSINESS OVERSIGHT
Ensuring a Fair and Secure Financial Services Marketplace for all Californians

Date: January 27, 2014

Subject: **2014 Legislative Bill Proposal Summary**

BILL SUBJECT: Money Transmitter Receipt Requirements

SUMMARY

This proposal would amend the Money Transmission Act (MTA) to clarify ambiguous provisions; harmonize the MTA with federal law; update the MTA so that it provides licensees with alternative and more effective means of providing receipts and consumer disclosures; and stipulate that out-of-state credit unions seeking to offer money transmission services in California must first be a licensed credit union maintaining a branch or facility in California and limit their money transmission services to persons within the credit union's field of membership.

IDENTIFICATION OF PROBLEM

The MTA requires receipts to include a "right to refund" statement for all money transmission activity, including e-commerce transactions where such notice of refund is unnecessary. Originally, the receipt requirement only applied to "person to person" transactions where a person sent money to another person in a foreign country. When the MTA was updated in 2011 to cover domestic money transmission, there was no amendment clarifying that it only applied to international person to person transactions. The Consumer Financial Protection Bureau (CFPB) adopted a federal remittance receipt requirement that does not match California. California law did not contemplate how receipts in the digital era should be delivered.

While current law allows state-licensed credit unions to offer money transmission services without first obtaining a separate MTA license, out-of-state credit unions have begun offering unlicensed money transmission services to residents of California directly and through unlicensed third parties, without obtaining approval to maintain a California branch or facility office. Those services are being offered to persons who fall outside of the credit union's field of membership.

PROPOSED SOLUTION

The Department's proposed amendments would (1) clarify under what conditions the money transmitter or agent must refund the customer's money; (2) clarify the content of the receipt and the notice of right to refund the money transmitter or agent must provide; (3) ease the regulatory burden on licensees by aligning receipt requirements with federal Regulation E, which provides alternative means for delivering required notices to customers, and (4) clarify that in order to qualify for an exemption from the MTA, an out of state credit union must have a license to maintain a branch or facility office in the state of California and offer money transmission services to persons in the credit union's field of membership.

JUSTIFICATION

The various receipt requirements pertaining to domestic money transmission, the payment for goods and services, and remittances between two commercial entities were the subject of concerns raised by multiple licensees and others in the years since the enactment of the MTA. The proposed amendments would address those concerns. Furthermore, after the CFPB finalized its rule for receipts in 2013 it became clear that the industry would benefit from having the California receipt requirements harmonized and made consistent with the federal requirements.

Offering money transmission services for California residents, directly and through unlicensed third parties, to consumers outside of the credit union's field of membership will deprive those consumers of the protections provided by the Money Transmission Act and limit the Department's legal recourse to hold such credit unions accountable.

PROGRAM BACKGROUND/LEGISLATIVE HISTORY

The MTA became effective on January 1, 2011 (Chapter 612, Statutes of 2010 (AB 2789, Committee on Banking and Finance). Prior to January 1, 2011, California required separate licensure for issuers of travelers checks (formerly Chapter 14 of Division 1 of the Financial Code), issuers of payment instruments (formerly Division 16 of the Financial Code) and transmitters of money abroad (formerly Chapter 14A of Division 1 of the Financial Code) under statutes that were largely unchanged since 1979.

Under the prior laws, issuers of travelers checks and issuers of payment instruments were required at all times to maintain shareholders' equity in an amount determined by the commissioner to be adequate and at all times to hold eligible securities having an aggregate value not less than the aggregate face amount of all outstanding travelers checks or outstanding payment instruments (or the combined aggregate if a licensee held a license as an issuer of travelers checks and as an issuer of payment instruments). Money transmitters were required at all times to maintain tangible shareholders' equity determined to be adequate by the commissioner and to deposit with the State Treasurer cash or securities (or a surety bond, in lieu of cash or securities) in an amount determined by the commissioner necessary for the protection of transmission money received. Regulation of money transmission was limited to transmission of money to foreign countries and did not account for rapidly expanding technology that provided access to additional media for the purpose of transmitting money from one person to another.

The enactment of the MTA in 2011 consolidated three existing laws into one licensing regime and required non-bank entities that transmit money domestically to be licensed under the MTA. Additionally, with changes in technology, non-bank stored value cards (and other media) and Internet transactions were becoming a mainstream option for people who utilized money services transactions. In 2011, the MTA closed many loopholes created by technological advances by requiring that licensees have adequate net worth and eligible securities to protect consumers when offering stored value (without regard to the media used) and allowing the commissioner to exercise safety and soundness reviews for such products. The MTA enhanced consumer protection of non-bank stored value by extending the 100 percent eligible security requirements to cover outstanding stored value.

For the most part, the fee structure, licensing requirements, enforcement powers and other regulatory requirements were present within the existing statutes, with the exception of those areas where consumer protection was enhanced. The enactment of the MTA in 2011 was a product of discussions between the regulated industry, the Department, and consumer groups.

AB 786 (Dickinson, Chapter 533, Statutes of 2013), a major reform to the MTA: (1) reduced minimum tangible shareholders' equity required for money transmitters to between $250,000 and $500,000, and authorized the commissioner to increase tangible shareholders' equity based on enumerated criteria; (2) provided exemption from the ownership requirements for eligible securities for funds held for the benefit of a money transmitter's customers; (3) provided an exemption from licensure for payroll processing companies; (4) specified that a receivable due from a bank through an automated clearinghouse transaction is an eligible security; (5) eliminated certain receipt and timing requirements when money transmission is for payment of goods or services; (6) allowed the commissioner to exempt a person or transaction from all or part of the MTA, and required web publication of such exemptions; (7) required the commissioner to publish written decisions, opinion letters and other formal written guidance regarding the MTA; and (8) required implementing regulations by the Department.

PROBABLE SUPPORT AND OPPOSITION

No active support or opposition is anticipated for this proposal.

FISCAL IMPACT:

Minor and absorbable costs for the Department.

ECONOMIC IMPACT

No significant economic impact is anticipated for this proposal.

COMPARISON WITH OTHER STATES

As early as August 3, 2000 the National Conference of Commissioners on Uniform State Laws (NCCUSL) issued its first draft of a model act to provide uniform regulation for money services businesses. One of the main drivers behind the creation of a uniform model act was to address concerns arising from potential money laundering activities and to make sure that the various state laws adequately addressed all the emerging payment systems and technologies that were coming to the market starting in the 1990's. A final version of the model act, the Uniform Money Services Act (UMSA), was ratified by NCCUSL on August 6, 2004.

Alaska, Arkansas, Iowa, Vermont and Washington have implemented the USMA in its entirety. The majority of states implemented models very similar to the MTA, by taking certain provisions from the UMSA but not implementing the whole document. Various market conditions and differences in regulatory environments necessitated a more nuanced approach.

Much of the language and the ideas incorporated into the MTA were based on the UMSA.

OTHER AFFECTED AGENCIES AND THEIR ROLES/VIEWS

None.

DRAFT LANGUAGE

The people of the State of California do enact as follows:

SECTION 1. Section 2010 of the Financial Code is amended to read:

2010. This division does not apply to the following:

(a) The United States or a department, agency, or instrumentality thereof, including any federal reserve bank and any federal home loan bank.

(b) Money transmission by the United States Postal Service or by a contractor on behalf of the United States Postal Service.

(c) A state, county, city, or any other governmental agency or governmental subdivision of a state.

(d) A commercial bank or industrial bank, the deposits of which are insured by the Federal Deposit Insurance Corporation or its successor, or any foreign (other nation) bank that is licensed under Article 3 (commencing with Section 1800) of Chapter 20 or that is authorized under federal law to maintain a federal agency or federal branch office in this state; a trust company licensed pursuant to Section 1042 or a national association authorized under federal law to engage in a trust banking business; an association or federal association, as defined in Section 5102 the deposits of which are insured by the Federal Deposit Insurance Corporation or its successor; and any federally or state chartered credit union with an office in California the member accounts of which are insured or guaranteed as provided in Section 14858, provided that money transmission is provided only to persons within the credit union's field of membership.

(e) Electronic funds transfer of governmental benefits for a federal, state, county, or local governmental agency by a contractor on behalf of the United States or a department, agency, or instrumentality thereof, or a state or governmental subdivision, agency, or instrumentality thereof.

(f) A board of trade designated as a contract market under the federal Commodity Exchange Act (7 U.S.C. Secs. 1–25, incl.) or a person that, in the ordinary course of business, provides clearance and settlement services for a board of trade to the extent of its operation as or for such a board.

(g) A person that provides clearance or settlement services pursuant to a registration as a clearing agency or an exemption from registration granted under the federal securities laws to the extent of its operation as such a provider.

(h) An operator of a payment system to the extent that it provides processing, clearing, or settlement services, between or among persons excluded by this section, in connection with wire transfers, credit card transactions, debit card transactions, stored value transactions, automated clearing house transfers, or similar funds transfers, to the extent of its operation as such a provider.

(i) A person registered as a securities broker-dealer under federal or state securities laws to the extent of its operation as such a broker-dealer.

(j) A person that delivers wages or salaries on behalf of employers to employees or facilitates the payment of payroll taxes to state and federal agencies, makes payments relating to employee benefit plans, makes distribution of other authorized deductions from employees' wages or salaries, or transmits other funds on behalf of an employer in connection with transactions related to employees. Notwithstanding this subdivision, a person described herein that offers money transmission services or provides stored value cards directly to individual customers shall comply with this division to the extent of such activity.

(k) A person listed under subdivision (d) is exempted from all the provisions of this division, except Sections 2062 and 2063.

2102. (a) Every licensee or its agent shall refund to the customer within 10 days of receipt of the customer's written request for a refund any and all money received for transmission unless any of the following occurs:

(1) The money has been forwarded within 10 days of the date of receipt.

(2) Instructions have been given committing an equivalent amount of money to the person designated by the customer within 10 days of the date of the receipt of the money from the customer.

(3) The customer instructs the licensee to transmit the money at a time beyond 10 days. If the customer gives instructions as to when the money shall be forwarded or transmitted and the moneys have not yet been forwarded or transmitted, the licensee or

its agent shall refund the customer's money within 10 days of receipt of the customer's written request for a refund.

(4) Refund would violate law.

~~(b) In the case of money received for transmission, a receipt shall be provided by a licensee or its agent to all customers which shall be made available to the customer in English and in the language principally used by that licensee or that agent to advertise, solicit, or negotiate, either orally or in writing, at that branch office if other than English. Except when money is received for transmission for the payment of goods or services, the receipt shall either include or have~~

~~attached a conspicuous statement in English and in the language principally used by the licensee or that agent to advertise, solicit, or negotiate, either orally or in writing at that branch office if other than English in a size equal to at least 10 point bold type, as follows:~~

~~RIGHT TO REFUND~~

~~"You, the customer, are entitled to a refund of the money to be transmitted as the result of this agreement if _____ (name of licensee) does not forward the money received from you within 10 days of the date of its receipt, or does not give instructions committing an equivalent amount of money to the person designated by you within 10 days of the date of the receipt of the funds from you unless otherwise instructed by you. If your instructions as to when the moneys shall be forwarded or transmitted are not complied with and the money has not yet been forwarded or transmitted, you have a~~

~~right to a refund of your money.~~

~~If you want a refund, you must mail or deliver your written request to ______ (name of licensee) at ______ (mailing address of licensee). If you do not receive your refund, you may be entitled to your money back plus a penalty of up to $1,000 and attorney's fees pursuant to Section 2102 of the California Financial Code.”~~

~~(c) A cause of action under this section may be brought in small claims court if it does not exceed the jurisdiction of that court, or in any other appropriate court. The customer shall be entitled to recover each of the following:~~

~~(1) Any and all money received for transmission, plus any fees and charges paid by the customer.~~

~~(2) A penalty in an amount not to exceed one thousand dollars ($1,000). The court shall award the prevailing party costs and attorney's fees.~~

(b) If a customer's instructions as to when the moneys shall be forwarded or transmitted are not complied with and the money has not yet been forwarded or transmitted, the customer has a right to a refund of his or her money. If a customer does not receive his or her refund, a cause of action under this section may be brought in small claims court if it does not exceed the jurisdiction of that court, or in any other appropriate court. The customer shall be entitled to recover each of the following:

(1) Any and all money received for transmission, plus any fees and charges paid by the customer.

(2) A penalty in an amount not to exceed one thousand dollars ($1,000). The court shall award the prevailing party costs and attorney's fees.

2103. (a) ~~The receipt presented to each customer for money received for transmission pursuant to subdivision (b) of Section 2102 shall clearly state the rate of exchange for the particular transaction, if any, the amount of commission or fees, and the net exchange after all fees and commissions have been deducted. The receipt shall also state the total amount of money presented by the customer and the total amount to be delivered to the beneficiary designated by the customer. These disclosures shall be in English and in the same language as that principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that branch office if other than English.~~

In the case of money received for transmission, the licensee or its agent shall give the sender or customer a receipt at the time of the transaction.

(1) The receipt must contain the following, as applicable:

(i) The name of the sender;

(ii) The name of the designated recipient;

(iii) The date of the transaction, which is the day the customer funds the money transmission;

(iv) The name of the licensee;

(v) The amount that will be transferred to the designated recipient, in the currency in which the money transmission is funded, using the term "Transfer Amount" or a substantially similar term;

(vi) Any fees and taxes imposed on the money transmission by the licensee or its agent which are payable or have been paid by the sender, in the currency in which the money transmission is funded, using the terms "Transfer Fees" for fees and "Transfer Taxes" for taxes, or substantially similar terms;

(vii) The total amount of the transaction, which is the sum of paragraphs ~~(a)(5) and (6)~~ (a)(1)(v) and (vi) of this section, in the currency in which the money transmission is funded, using the term "Total" or a substantially similar term;

(viii) The exchange rate, if any, used by the licensee or its agent for the money transmission, rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places, using the term "Exchange Rate" or a substantially similar term;

(ix) For all transmissions, other than transmissions related to e-commerce transactions, the amount that will be received by the designated recipient, in the currency in which the funds will be received, using the term "Total to Recipient" or substantially similar term. For transmissions related to e-commerce transactions, the amount that will be received by the designated recipient before any fees and taxes imposed on the money transmission by the licensee or its agent and payable by the designated recipient are deducted, using the term "Total to Recipient" or substantially similar term. Any such fees and taxes must be disclosed to the designated recipient. Such disclosure of fees and taxes payable by the designated recipient, which need not be disclosed to the sender, shall be disclosed as part of a separate written agreement between the licensee and the designated recipient.

(2) In addition to the disclosures set forth in subsection (1) of this section, the receipt

shall either include or have attached a conspicuous statement as follows:

RIGHT TO REFUND

"You, the customer, are entitled to a refund of the money to be transmitted as the result of this agreement if ______ (name of licensee) does not forward the money received from you within 10 days of the date of its receipt, or does not give instructions committing an equivalent amount of money to the person designated by you within 10 days of the date of the receipt of the funds from you unless otherwise instructed by you.

If your instructions as to when the moneys shall be forwarded or transmitted are not complied with and the money has not yet been forwarded or transmitted, you have a right to a refund of your money.

If you want a refund, you must mail or deliver your written request to (name of licensee) at (mailing address of licensee). If you do not receive your refund, you may be entitled to your money back plus a penalty of up to $1,000 and attorney's fees pursuant to Section 2102 of the California Financial Code."

However, the foregoing Right to Refund statement is not required to be included on receipts involving (1) transactions where the sender is a commercial entity; (2) transactions that involve entities of a type listed in sections 2010 (a), (b) and (c); or (3) e-commerce transactions where the customer sends a payment for goods or services.

(3) The receipt required by this section shall be made in English and in the language principally used by that licensee or that agent to advertise, solicit, or negotiate, either orally or in writing, at that branch office if other than English. For transactions that do not occur in a branch office, the receipt shall be made in English and in the language

principally used by that licensee or that agent to advertise, solicit, or negotiate money transmission, either orally or in writing.

(4) The receipt required by this section may be provided electronically for transactions that are initiated electronically or in which a customer agrees to receive an electronic receipt.

(5) Disclosures in the receipt required by this section shall be in a minimum eight-point font, except for receipts provided via mobile phone or text message.

(b) If window and exterior signs concerning the rates of exchange for money received for transmission are used, they shall clearly state in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, at that branch office if other than English, the rate of exchange for exchanging the currency of the United States for foreign currency. If an interior sign or any advertising is used that quotes exchange rates, it shall, in addition to clearly stating the rates of exchange for exchanging the currency of the United States for foreign currency, also state all commissions and fees charged on all such transactions.

(c) At each branch office or website, if applicable, there shall be disclosed the exchange rates, fees, and commissions charged in English and in the same language principally used by the licensee or any agent of the licensee to advertise, solicit, or negotiate, either orally or in writing, with respect to money received for transmission at that branch office or website. At each branch office, there shall be signage clearly identifying the name of the licensee as well as any trade names used by the licensee at that branch office. Any website through which a licensee conducts money transmission business shall clearly identify the name of the licensee as well as any trade names used by the licensee on that website.

(d) If the customer does not specify at the time the money is presented to the licensee or its agent the country to which the money is to be transmitted, the rate of exchange for the transaction is not required to be set forth on the receipt. If the customer does specify at the time the money is presented to the licensee or its agent the country to which the money is to be transmitted but the specified country's laws require the rate of exchange for the transaction to be determined at the time the transaction is paid out to the intended recipient, the rate of exchange for the transaction is not required to be set forth on the receipt.

From:	Farouk, Mark <Mark.Farouk@asm.ca.gov>
Sent:	Monday, January 27, 2014 3:39 PM
To:	O'Toole, Dave@DBO
Cc:	Mirrashidi, Lila@DBO; Oseguera, Elizabeth@DBO
Subject:	RE: DBO Bill Proposals

Thanks Dave. We plan on doing a clean-up bill on MTA so we could put this proposal in the one we currently have cooking at Leg Counsel, if you don't mind sharing with what we have. We may be able to do a committee bill on the clean-up. We are planning another cleanup-bill relating to the Uniform Limited Liability Company Act. I discovered a few days ago, by accident, that the ULLCA screwed up several cross references in the Financial Code.

We'll get back to you.

Mark

From: O'Toole, Dave@DBO [mailto:Dave.O'Toole@dbo.ca.gov]
Sent: Monday, January 27, 2014 3:31 PM
To: Farouk, Mark
Cc: Mirrashidi, Lila@DBO; Oseguera, Elizabeth@DBO
Subject: DBO Bill Proposals

Hey Mark-

Just left you a message about this... We'd appreciate your considering these for the committee/Assemblyman's bill package. There's a technical clean-up bill (perhaps for your committee bill) and then a more interesting bill on money transmission receipt. I'm stepping out for meetings for a bit but will be in the rest of the week if you want to discuss. You can also reach Liz Oseguera (cc'ed) at 322-7248.

Thanks for taking a look-

Dave O'Toole
Chief Deputy Commissioner
California Department of Business Oversight
Tel: 916/324-6623
Fax: 916/322-1559

Effective July 1, 2013, the Department of Corporations and the Department of Financial Institutions merged to form the Department of Business Oversight in accordance with the Governor's reorganization of state departments to provide services more efficiently and effectively.

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McGuffin, Matthew@DBO

From:	Farouk, Mark <Mark.Farouk@asm.ca.gov>
Sent:	Monday, March 10, 2014 10:37 AM
To:	Owen, Jan Lynn@DBO
Cc:	O'Toole, Dave@DBO
Subject:	FYI

CoinDesk
The Voice of Digital Currency

Meet Roger Dickinson, The Man Behind California's Bill to Legalize Bitcoin

Pete Rizzo (@pete_rizzo_) | Published on March 8, 2014 at 12:49 GMT | News, Regulation, US & Canada

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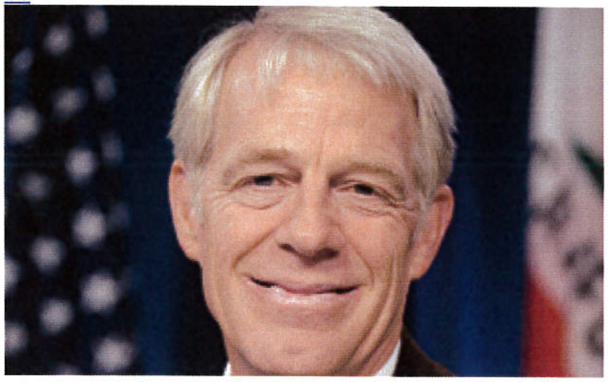

In the world of digital currency, misinformation spreads quickly, and there may be no greater recent example of this than California Assembly Bill 129, a piece of proposed legislation that has been heralded somewhat incorrectly as an already successful move by the state to "legalize cryptocurrencies".

Though, the bill would recognize digital currencies as "lawful money", it would also ensure the legal footing of additional forms of legal tender such as points and coupons, and is currently only halfway to becoming law.

Regardless, many in the digital currency community have high hopes that AB 129 and AB 786 (a bill passed in September that lowered capital requirements for money transmitters) signal that California will be among the more progressive US jurisdictions when it comes to digital currency.

With this in mind, CoinDesk set out to speak to California Assemblymember Roger Dickinson, the man who introduced both laws, to determine the extent to which the bills were crafted for the still-nascent industry.

However, if bitcoiners were hoping for a more progressive alternative to New York's Benjamin Lawsky, Dickinson doesn't exactly fit the mantle.

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Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

O'Toole, Dave@DBO

From: O'Toole, Dave@DBO
Sent: Monday, March 10, 2014 3:30 PM
To: 'Farouk, Mark'
Subject: RE: FYI

Bracing myself... Thanks, Mark.

Dave O'Toole
Chief Deputy Commissioner
California Department of Business Oversight
Tel: 916/324-6623
Fax: 916/322-1559

From: Farouk, Mark [mailto:Mark.Farouk@asm.ca.gov]
Sent: Monday, March 10, 2014 10:37 AM
To: Owen, Jan Lynn@DBO
Cc: O'Toole, Dave@DBO
Subject: FYI

CoinDesk
The Voice of Digital Currency

Meet Roger Dickinson, The Man Behind California's Bill to Legalize Bitcoin

Pete Rizzo (@pete_rizzo_) | Published on March 8, 2014 at 12:49 GMT | News, Regulation, US & Canada

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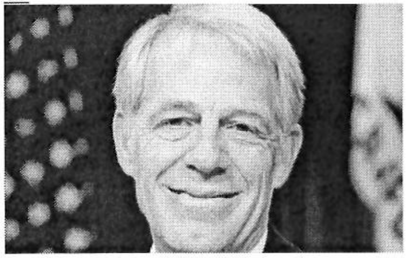

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Sent: Monday, March 10, 2014 10:40 AM
To: Farouk, Mark
Subject: RE: FYI

Oh my!

Jan Lynn Owen
Commissioner
California Department of Business Oversight
1515 K Street Suite 200
Sacramento, California 95814
916-324-9011

www.dbo.ca.gov

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McGuffin, Matthew@DBO

From: Farouk, Mark <Mark.Farouk@asm.ca.gov>
Sent: Monday, March 10, 2014 10:41 AM
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From: Owen, Jan Lynn@DBO [mailto:JanLynn.Owen@dbo.ca.gov]
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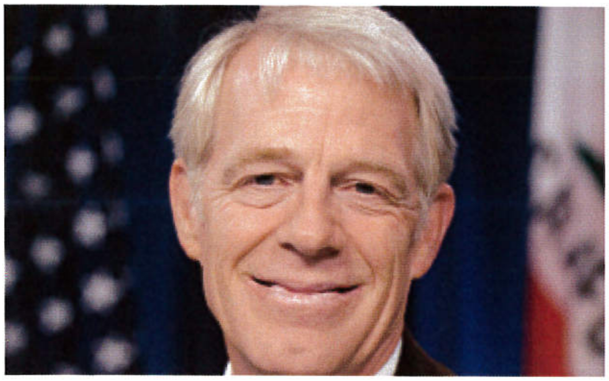

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McGuffin, Matthew@DBO

From:	Owen, Jan Lynn@DBO
Sent:	Monday, March 10, 2014 10:43 AM
To:	Farouk, Mark
Subject:	RE: FYI

Yep- but what a story….J

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Sacramento, California 95814
916-324-9011

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COMMISSIONER OF BUSINESS OVERSIGHT ★ STATE OF CALIFORNIA ★

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From: Farouk, Mark <Mark.Farouk@asm.ca.gov>
Sent: Tuesday, April 01, 2014 12:03 PM
To: O'Toole, Dave@DBO; Owen, Jan Lynn@DBO
Subject: 2209- Money Transmission

Dave & Jan,

Do you have some time next week (Thursday the 10th would be ideal) to meet with myself and the California Retailers regarding AB 2209. We would like to walk through any concerns the department may have.

Thanks.

Mark Farouk
Chief Consultant
Assembly Banking & Finance Committee
Assemblymember Roger Dickinson- Chair
(916) 319-3081-p
(916) 319-3181-f
Mark.Farouk@asm.ca.gov

McQuinn, Michael@DBO

From: Venchiarutti, Robert@DBO
Sent: Friday, May 23, 2014 9:58 AM
To: McQuinn, Michael@DBO
Subject: FW:

Robert Venchiarutti
Deputy Commissioner, Money Transmitter Division
Department of Business Oversight
Division of Financial Institutions
45 Fremont Street, 17th Floor
San Francisco, CA 94105
(415) 263-8511

From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Tuesday, April 01, 2014 12:32 PM
To: Venchiarutti, Robert@DBO
Subject:

I just tried top call you. I gather I am no longer on DBO's circulation list. I just found out that there are proposed regs. BTW, whatever happened with the meetings with Jan that you had mentioned sometime ago? Thanks Bob

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

To ensure compliance with requirements imposed by the IRS, Morrison & Foerster LLP informs you that, if any advice concerning one or more U.S. Federal tax issues is contained in this communication (including any attachments), such advice is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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McQuinn, Michael@DBO

From:	Venchiarutti, Robert@DBO
Sent:	Friday, May 23, 2014 9:59 AM
To:	McQuinn, Michael@DBO
Subject:	FW:
Attachments:	Regulating the new cashless world.pdf

Robert Venchiarutti
Deputy Commissioner, Money Transmitter Division
Department of Business Oversight
Division of Financial Institutions
45 Fremont Street, 17th Floor
San Francisco, CA 94105
(415) 263-8511

From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Wednesday, January 15, 2014 6:58 AM
To: Venchiarutti, Robert@DBO
Subject:

Bob—another pitch for an express "agent of the payee" exemption.

Ezra C. Levine
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Washington, DC 20006
202-887-1597
elevine@mofo.com

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UNIVERSITY OF NEW MEXICO SCHOOL OF LAW
LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 2013-06

Regulating the New Cashless World

Kevin V. Tu

February 18, 2013

Founded in 1947, the University of New Mexico School of Law is a vibrant, diverse community of outstanding faculty, students, and alumni who are making a difference across the country and around the world. The School, which offers a rich and engaged classroom experience guided by faculty members who are leaders in their fields, is an "acknowledged" leader in the fields of clinical education, American Indian law, and natural resources and environmental law. The University of New Mexico School of Law Legal Studies eJournal contains abstracts, works in progress, and published papers from our faculty. For more information see: http://lawschool.unm.edu.

REGULATING THE NEW CASHLESS WORLD

*Kevin V. Tu**

ABSTRACT

Internet and mobile payment volume is growing exponentially. From established technology giants like Amazon, Google, and PayPal to relative newcomers like Square and LevelUp, Internet and mobile payment systems are changing the face of modern commerce. Consumers and merchants have embraced cashless payment options like mobile wallets and mobile credit card readers. Unfortunately, existing laws and regulations lag behind. State money transmitter laws, once a virtual unknown, have become a source of frustration and confusion. These statutes historically regulated money transfer businesses like Western Union with an eye toward preventing consumer harm. The plain language of such statutes, however, purports to broadly regulate the receipt of money or monetary value for the purpose of transmitting it to another place or location by any means. As such, an array of business activity, from bike messengers to app stores, is potentially implicated.

In the absence of clear guidance and inconsistent state enforcement, a number of services that accept customer payments on behalf of merchants, in connection with the sale of the merchant's goods and services, have struggled with the question of whether their unique business models are subject to regulation. Some companies, such as Square, have apparently decided that licensing and compliance with state money transmitter laws is not required for the operation of their payment business. However, doing so comes with very real risks. The Illinois Department of Financial & Professional Regulations recently issued a cease and desist order for alleged violations of the state's Transmitters of Money Act. As a result, those that do not take preventative action to comply may face regulatory enforcement action if a state regulatory agency subsequently decides that a particular business activity falls within the scope of the statute. In the face of such uncertainty, Amazon, Google, and PayPal have all become licensed

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money transmitters under state law. Even Facebook has become licensed in advance of launching a payments product in order to mitigate the risk of sanctions as the development of their payments product continues to evolve. While established companies can afford to comply, the licensing and regulatory compliance costs exist as a barrier to entry for payment start-ups and may stifle continued innovation if left unsettled.

This Article takes the first in-depth look at the intersection of technology and consumer protection in the context of new and emerging payment systems and seeks to resolve the apparent tension between the two, suggesting a framework for modernizing state money transmitter laws to accommodate new technology, innovative business models, and the realities of a cashless world while still respecting the statutory purpose of consumer protection where appropriate. As a result, the framework proposed in this Article will facilitate continued development of new payment services, which benefits merchant sellers (both small and large) by providing them with more efficient and sometimes cheaper options for accepting payments from customers without increasing the risk of harm to the consumer customers who rely on such services to make payments.

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INTRODUCTION

As merchants and consumers increasingly adopt and embrace technological innovations to the traditional channels through which they engage in commerce, established laws and regulatory frameworks must be reassessed for both relevance and applicability. Nowhere is this more evident than with respect to new and emerging forms of payment. The way that consumers pay for goods and services has undergone transformational change in recent years. Where paper-based payment systems such as cash and checks once ruled, and credit/debit cards and stored value cards now dominate, Internet and mobile payments threaten to take over.[1]

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[1] *See* Colin C. Richard, *Dodd-Frank, International Remittances, and Mobile Banking: The Federal Reserve's Role in Enabling International Economic Development*, 105 NW. U. L. REV. COLLOQUY 248, 253–54 (2011); *A Summary of the Roundtable Discussion on Stored-Value Cards and Other Prepaid Products*, FEDERAL RESERVE (Jan. 12, 2005), http://www.federalreserve.gov/paymentsystems/storedvalue/default.htm; Peter Cohan, *Will Square's Starbucks Deal Spark the End of Cash?*, FORBES (Aug. 8, 2012, 8:24 AM), http://www.forbes.com/sites/petercohan/2012/08/08/will-

The use of Internet and mobile payment technologies to conclude purchase and sale transactions has become commonplace and is expected to grow exponentially. Some forecasts predict that global business to consumer e-commerce sales will top $1.25 trillion per year by 2013, noting that annual business to consumer e-commerce sales increased by 20% from 2010 to 2011.[2] Goldman Sachs predicts similar growth, finding that global e-commerce sales will reach $963 billion by 2013, with an annual growth rate of 19.4%.[3] Mobile commerce will likely see a similar upward trajectory with analysts anticipating that mobile payment transactions will grow nearly four-fold over the next five years to more than $1.3 trillion.[4]

Capitalizing on these changing commerce habits, payment industry innovators have introduced a number of new services that facilitate the acceptance of Internet and mobile payments by merchants when selling their goods or services. Instead of developing the capability to accept Internet and mobile payments directly, merchants may now select from a host of third-party service providers. Those who provide some form of Internet or mobile payment services to merchants include giants such as Amazon,[5] Google,[6] Isis (an alliance between T-Mobile, AT&T and Verizon

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squares-starbucks-deal-spark-the-end-of-cash/; Suzanne McGee, *End Of Cash: Six Things That Could Take The Place Of Paper Money*, Huffington Post (May 8, 2012, 11:44 PM), http://www.huffingtonpost.com/2012/05/08/end-of-cash-replacing-money_n_1500885.html#slide=more225166; Deirdre Van Dyk, *The End of Cash*, Time (Jan. 9, 2012), at 48; D. Steven White, *Predicting U.S. E-Commerce Growth Through 2013*, All Things Marketing (Dec. 2, 2011), http://dstevenwhite.com/2011/12/02/predicting-u-s-e-commerce-growth-through-2013/ (last visited Sept. 30, 2013); D. Steven White, *U.S. E-Commerce Growth 2000-2009*, All Things Marketing (Aug. 20, 2010), http://dstevenwhite.com/2010/08/20/u-s-e-commerce-growth-2000-2009/ (discussing e-commerce growth from 2000 to 2009); David Wolman, *Time for Cash to Cash Out?*, Wall St. J. (Feb. 11, 2012), http://online.wsj.com/article/SB10001424052970204136404577209241595751130.html.

[2] Abdul Montaqim, *Global e-Commerce Sales Will Top $1.25 Trillion by 2013*, Internet Retailer (June 14, 2012, 10:19 AM), http://www.internetretailer.com/2012/06/14/global-e-commerce-sales-will-top-125-trillion-2013.

[3] Don Davis, *Global e-Commerce Sales Head to the $1 Trillion Mark*, Internet Retailer (Jan. 4, 2011, 3:02 PM), http://www.internetretailer.com/2011/01/04/global-e-commerce-sales-head-1-trillion-mark.

[4] Press Release, Juniper Research, Mobile Payments to Reach $1.3tn Annually by 2017, as NFC and Physical Goods Sales Accelerate (Aug. 15, 2012), *available at* http://juniperresearch.com/viewpressrelease.php?pr=332.

[5] *See* Amazon Payments, http://www.amazonservices.com/services/amazon-payments.html (last visited Sept. 30, 2013) (describing how sellers can use Amazon Payments to accept payments on the seller's website); Amazon Services, http://www.amazonservices.com/selling-on-amazon/how-it-works.htm (last visited Sept. 30, 2013) (describing how sellers can sell on Amazon.com); *see also infra* Part II.C.

[6] *See Google Checkout*, Google, http://checkout.google.com/seller/what.html?hl=en&gl=GB (last visited Sept. 30, 2013) (describing how merchants can use Google Checkout to process payments); *Google Wallet*, Google, http://www.google.com/wallet/how-it-works/ (last visited Sept. 30, 2013) (describing how Google Wallet can be used to make online and in-store payments); *see also infra* Part II.C.

Wireless),[7] Merchant Customer Exchange (a mobile commerce platform created by leading U.S. retailers including BestBuy, Target Corp., and Wal-Mart Stores),[8] PayPal,[9] Apple,[10] and Android.[11] In addition, upstarts such as Square[12] and LevelUp[13] clutter the market.[14]

While the business model, functionality, and scope of each payment service can vary greatly, the service provider generally offers a mechanism through which it acts on behalf of a merchant in accepting an Internet or mobile payment from a buyer of the merchant's goods or services and facilitates the transfer of the payment to the merchant. Online marketplaces,[15] application stores,[16] checkout or shopping cart services,[17] mobile wallets,[18] and mobile card readers[19] all involve some degree of Internet or mobile payment acceptance and processing on behalf of merchant sellers. Although the customer pays the service provider (e.g., by providing credit/debit card information), the merchant is in fact the seller of record from whom the purchase is made. As such, the service provider essentially functions as a third-party intermediary who accepts Internet and/or mobile payments from a buyer on behalf of the merchant, subsequently transferring the funds to the merchant (hereinafter referred to generally as "payment services").

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[7] *See* ISIS, http://isisforbusiness.com/ (last visited Sept. 30, 2013) (describing how merchants can use Isis to accept mobile payments); *see also infra* Part II.C.

[8] *See* Press Release, Merch. Customer Exch., Leading Retailers Form Merch. Customer Exch. to Deliver Mobile Wallet (Aug. 15, 2013), *available at* http://www.mcx.com/images/mcx-press-081512.pdf (describing a mobile wallet service that can be accepted as a form of payment by participating merchants); *see also infra* Part II.C.

[9] *See However You Do Business, PayPal Gets You Paid*, PAYPAL, https://www.paypal.com/webapps/mpp/merchant?intl_cid-main:mktg:personal:sell:overview|business-solutions-x-link (last visited Sept. 30, 2013) (describing the business solutions that PayPal offers for accepting credit card payments); *Sell Overview*, PAYPAL, https://www.paypal.com/webapps/mpp/selling-with-paypal (last visited Sept. 30, 2013) (describing how PayPal can be used to accept payments online and in person); *see also infra* Part II.C.

[10] *See iOS Developer Program*, APPLE, https://developer.apple.com/programs/ios/ (last visited Feb. 13, 2013) (describing how app developers can distribute apps via the Apple App Store); *see also infra* Part II.C.

[11] *See Developers*, ANDROID, http://developer.android.com/distribute/googleplay/about/monetizing.html (last visited Sept. 30, 2013) (discussing how app developers can distribute their apps via the Google Play app store); *see also infra* Part II.C.

[12] *See Payments and Receipts in Square Wallet*, SQUARE, https://squareup.com/help/en-us/article/3906-square-wallet-payments-and-receipts (last visited Sept. 30, 2013) (describing how Square Wallets facilitates acceptance of mobile payments); *Swipe Card Payments with the Square Reader*, SQUARE, https://squareup.com/help/en-us/article/5174-swipe-card-payments-with-the-square-reader (last visited Sept. 30, 2013) (describing the app and mobile card reader that is provided to merchants for purposes allowing a merchant to user their own mobile device to accept credit and debit card payments); *see also infra* Part II.C.

[13] *See* LEVELUP, https://www.thelevelup.com/how-it-works (last visited Sept. 30, 2013) (describing how LevelUp facilitates the acceptance of mobile payments); *see also infra* Part II.C.

[14] *See* Margaret Cashill, *Mobile Payment Services Proliferate, Business Owners Save*, TAMPA BAY BUSINESS JOURNAL (Nov. 30, 2012), http://www.bizjournals.com/tampabay/print-edition/2012/11/30/mobile-payment-services-proliferate.html?page=all (discussing the proliferation of mobile payment systems); Thomas F. Dapp, *The Future of (Mobile) Payments: New (Online) Players Competing with Banks*, DEUTSCHE BANK (Dec. 20, 2012), http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000298950/The+future+of+(mobile)+payments%3A+New+(online)+players+competing+with+banks.PDF (Sept. 30, 2013) (discussing the rise of mobile and online payments and the growth of non-bank competitors in the provision of payment and financial-related services); Leena Rao, *The Mobile Payments Fustercluck*, TECH CRUNCH (Sep. 9, 2012), http://techcrunch.com/2012/09/09/the-mobile-payments-fustercluck/ (noting that a new way to pay using a mobile phone seems to pop up every week).

[15] Online marketplaces like the Amazon Marketplace allow independent merchants (big and small) to sell on Amazon.com. In connection with providing the sales platform, Amazon handles the payment process, receiving credit/debit card information from the buyer and settling with the merchant. *See infra* Part II.C.

The sheer number of Internet and mobile payment options and speed of adoption highlights the conundrum: how can any legal and regulatory regime possibly keep up with the pace of technological advances and adoption? Internet and mobile payment methods have revolutionized modern commerce, but the law understandably lags behind. As a component part of establishing a comprehensive and consistent regulatory regime for new and merging payment systems, this Article suggests that existing laws, such as state money transmitter laws, must be reexamined in light of technological advances and changes in consumer behavior to clearly define the scope of their applicability to new business models.

Money transmitter laws are essentially "safety and soundness" laws aimed at protecting consumers from suffering losses, and have traditionally governed money transfers services like Western Union. However, the sweeping language of such statutes and the lack of clearly applicable exemptions threaten to subsume a number of innovative business models, including many new and emerging payment systems. Given the burden and expense of state-specific licensing and compliance requirements, this has created real problems for potentially regulated businesses who must struggle to ascertain whether money transmitter laws extend to their activities. In short, businesses are faced with a choice between two

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[16] App stores depend on independent developers to create apps that are made available for purchase on hosted app stores. The service provider receives payments from those who purchase apps and subsequently settles with the developer/seller. *See infra* Part II.C.

[17] Payment services, such as PayPal and Amazon Payments, allow merchants to accept credit/debit cards via the Internet by placing a "check out" button or "shopping cart" on the merchant's website. Although the buyer visits the merchant's website instead of a third-party marketplace, the payment process is operated by a third-party service provider who subsequently settles with the merchant. *See infra* Part II.C.

[18] Mobile wallets, such as Google Wallet, Isis, Square, LevelUp and Merchant Customer Exchange, allow a consumer to use a smartphone like a credit/debit card. The consumer's credit/debit card information is stored by the service provider, and in-store purchases can be made by waving the phone in front of a scanner provided to the merchant, which transfers the payment card information with the service provider, subsequently settling with the merchant. *See infra* Part II.C.

[19] Payment services like Square and PayPal provide merchants with a mobile credit/debit card reader and a mobile application that allows the merchant to use its own mobile device to accept credit/debit card payments. The service provider receives the payment card information, initiates the payment process, and facilitates settlement with the merchant. *See infra* Part II.C.

undesirable alternatives[20]: forgo state licensing and risk sanction from a state regulator[21] or bear the potentially unnecessary cost of compliance.[22] While established companies like Amazon, Google, PayPal, and even Facebook have the resources to mitigate the risk by becoming licensed, the cost for start-ups may be prohibitive. Accordingly, the unsettled legal and regulatory environment has the potential to disincentivize the continued development of desirable payment innovations.

This Article attempts to reconcile the apparent conflict between the statutory purpose of consumer protection and the desire for advancements that promote commerce by: (1) setting forth an approach for recasting state money transmitter laws in light of technological advances while respecting the consumer protection purpose of such statutes; and (2) supporting the adoption of an exemption that is tailored to differentiate new payment services in light of their relative risk of consumer loss—extending regulation where appropriate and exempting innovations where little risk exists.

Part I of this Article overviews the laws and regulations that presently govern the business of money transmission. In the absence of an explicit statutory exemption, state money transmitter laws purport to regulate any activity that falls within the statutory definition of "money transmission"[23] and imposes a myriad of state-specific licensing,[24] financial security,[25] examination,[26] recordkeeping,[27] and reporting requirements.[28]

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[20] Complaint at 3–4, Think Computer Corp. v. Dwolla, Inc. et al, No. 5:13-cv-02054-EJD (N.D. Cal. May 6, 2013), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1379&context=historical (describing the dilemma facing payments providers in determining the applicability of state money transmitter laws to new technology along with the inconsistent enforcement of such laws by state regulators).

[21] *See, e.g.*, Cease and Desist Order, No. 13 CC 208, State of Ill. Dep't of Fin. & Prof'l Regulation, Div. of Fin. Inst., *available at* http://www.idfpr.com/dfi/CCD/Discipline/SquarePersonifiedCDOrder13CC208.pdf (noting the penalties and fines imposed on Square for violations of the Illinois money transmitter law); Letter from Aaron Greenspan, Think Computer Corp. President & CEO, to Roger Dickinson, Cal. State Assemb., Comm. on Banking & Fin. Chairman (Nov. 7, 2012) [hereinafter Letter from Greenspan], *available at* https://s.facecash.com/legal/20121107.dficomment.pdf (noting that Think Computer Corporation shut down its mobile payment product after threats of incarceration from California regulators based on alleged violations of the California money transmitter law); Ken Yeung, *Square Served Cease and Desist Order in Illinois for Violating the Transmitters of Money Act*, NEXT WEB (Mar. 1, 2013, 7:37 PM), http://thenextweb.com/insider/2013/03/01/square-receives-cease-and-desist-from-illinois-regulators/ (noting that the Illinois Department of Financial & Professional Regulation recently issued Square a cease and desist order for violating the state's money transmitter law).

[22] *See, e.g.*, Brittany Darwell, *Facebook Obtains Money Transmitter Licenses in 15 States*, INSIDE FACEBOOK (Feb. 22, 2012), http://www.insidefacebook.com/2012/02/22/facebook-obtains-money-transmitter-licenses-in-15-states/ (last visited Oct. 1, 2013); Sean Sposito, *Facebook Fast-Tracks Its Payments Business*, AMERICAN BANKER (Feb. 21, 2012), http://www.americanbanker.com/issues/177_35/facebook-credits-money-transmitter-license-bank-regulation-1046825-1.html (noting Facebook's election to become licensed under state money transmitter laws in anticipation of potential regulation of a developing payment product).

[23] "Money transmission" is often broadly defined as the receipt of money or value for the purpose of transferring it to another person or location by any means. *See infra* Part I.A.1.

Part II of this Article illustrates how the broad definition of "money transmission" coupled with a limited list of explicit exemptions results in an uncertain regulatory environment where a host of services from bike messengers to app stores could potentially fall within the scope of regulation.[29]

Part III of this Article explores the growing outcry about the lack of clarity and how it adversely impacts the providers of Internet and mobile payment services.[30] The providers of such services face an unappealing dilemma. They can obtain a license and incur the cost and expense of maintaining compliance with a patchwork of state-specific requirements (perhaps needlessly),[31] or they can elect to forego licensing and run the risk of civil and criminal penalties should a state regulator determine that their business constitutes money transmission.[32]

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[24] *See infra* Part I.

[25] The financial security requirements generally include an obligation to provide a surety bond, which varies in amount depending on the state. *See, e.g.*, COLO. REV. STAT. ANN. § 12-52-107(1)(a) (West 2010). In addition, licensed money transmitters must typically satisfy minimum net worth requirements and may be required to maintain minimum amounts of permissible investments. *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-603 (West 2011); D.C. CODE § 26-1004 (2001); *see also infra* Part I.A.3.

[26] Depending on the state, regulators may require audits, investigate a money transmitter's books and records or conduct an onsite examination. *See, e.g.*, IOWA CODE ANN. § 533C.501(1) (West 2011); MD. CODE ANN., FIN. INST. §§ 12-421, 12-423, 12-424 (LexisNexis 2011); see *also infra* Part I.A.3.

[27] Licensed money transmitters must generally maintain certain records for statutorily mandated periods of time. *See, e.g.*, KY. REV. STAT. ANN. § 286.11-029 (West 2011); *see also infra* Part I.A.3.

[28] Licensed money transmitters must generally file financial reports with state regulators on a regular basis and may be required to make periodic filings upon the occurrence of specified events. *See, e.g.*, FLA. STAT. ANN. § 560.118(1) (West 2012) (requiring filing of annual financial statements and quarterly reports); *id.* § 560.126 (requiring written notice of significant events); *see also infra* Part I.A.3.

[29] *See infra* Part II.

[30] Concerns have been expressed over the potential application of federal and state money transmitter laws to new and emerging payment systems, including the chilling effect on innovation by start-up due to the unsettled regulatory landscape and the costs of compliance. *See* Letter from Greenspan, *supra* note 21; Marie Hogan, *California's New Money Transmission Law Sweeps Up*, JOSEPH & COHEN (May 19, 2011), http://josephandcohen.com/2011/05/californias-new-money-transmission-law-sweeps-up; Brian J. Hurh & Peter Luce, *Regulators Emphasize Importance of Money Transmission Laws, Consumer Protection and Other Regulatory Compliance for Mobile and Other Emerging Payment Innovations*, PAYMENT LAW ADVISOR (Oct. 3, 2012), http://www.jdsupra.com/legalnews/regulators-emphasize-importance-of-money-65722/; James Mariani, *The California Money Transmission Act: Boon to Consumers or Bane to Innovation?*, TIMELY TECH (Sept. 26, 2012), http://illinoisjltp.com/timelytech/?p=1 (last visted Oct. 1, 2013); Owen Thomas, *This Innovation-Killing California Law Could Get a Host Of Startups In Money Trouble*, BUSINESS INSIDER (July 11, 2012, 6:21 PM), http://www.businessinsider.com/california-money-transmitter-act-startups-2012-7#ixzz2KW3UA2hZ; *see also infra* Part III.

[31] *See supra* note 30.

Part IV of this Article illustrates how the statutory purpose of money transmitter laws—to protect consumers from suffering losses at the hands of non-performing money transmitters—is not served by blindly extending regulation to Internet and mobile payment systems.[33] In situations where there is no greater risk of consumer loss, such an approach is overly expansive and needlessly impinges upon commerce while wholly ignoring the evolving habits of merchants and consumers.

Part V of this Article concludes that the continued growth of Internet and mobile payments accentuates the need for legislative action and proposes that state money transmitter laws be amended to include a narrowly tailored "agent of the payee" exemption. Such an exemption would amend the definition of "money transmission" to unambiguously exclude the receipt of a payment for delivery to a merchant in connection with a sale by the merchant so long as: (1) the service is provided to or on behalf of a merchant and not directly to a consumer; (2) the service provider is acting pursuant to a written contract with the merchant; and (3) the contract and terms of service mitigate the risk of loss to the consumer by acknowledging that payment to the service provider constitutes payment to the merchant and that the merchant has no claim against the consumer for the failure of the service provider to transfer the payment to the merchant.[34] This approach assures that state money transmitter laws will be fittingly recast in light of technological advances and market realities while upholding the consumer protection goals of such statutes where warranted.[35]

I. THE LEGAL AND REGULATORY LANDSCAPE OF MONEY TRANSMISSION

United States regulation of money transmission employs a dual-system of both state and federal laws. State money transmitter laws vary by jurisdiction[36] and focus on consumer protection concerns.[37] As such, state money transmitter laws are essentially "safety and soundness" statutes designed to ensure that consumer funds are protected from loss.[38] In contrast, the Bank Secrecy Act (BSA), which regulates money transmission at the federal level, exists primarily as an anti-money laundering statute.[39] Despite the differing purpose, state and federal money transmitter laws both opt to define the regulated activity of "money transmission" in broad terms,[40] relying on a list of explicit statutory exemptions to narrow the scope of regulation.[41] Unless an exemption applies, any person engaging in an activity that constitutes "money transmission" must be licensed under state law[42] and comply with a host of regulatory requirements involving financial security, recordkeeping, reporting, and examination.[43]

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[32] *See* 18 U.S.C. § 1960 (2006); MD. CODE ANN., FIN. INST. §§ 12-429 to 430 (LexisNexis 2011); Letter from Greenspan, *supra* note 21.

[33] *See infra* Part IV.

[34] *See infra* Part V.

[35] *See infra* Part V.

[36] *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64 (2006), *available at* http://www.uniformlaws.org/shared/docs/money%20services/umsa_final04.pdf (noting that state laws are "extremely varied"); *see also infra* Part II.A.

[37] *See, e.g.*, CAL. FIN. CODE § 2002 (West 2013) (noting that the purpose of the statute is to protect the interests of consumers); VA. CODE ANN. § 6.2-1902(B) (2010) ("This chapter shall be construed by the Commission for the purpose of protecting, against financial loss, residents of the Commonwealth who (i) purchase money orders or (ii) give money or control of their funds or credit

A. State Regulation of Money Transmission

While the statutory language varies from state to state,[44] money transmitter laws generally seek to regulate the business of receiving money (or monetary value) for the purpose of transmission to another person or location.[45] State money transmitter laws require that any person engaging in such activity obtain a license from the appropriate state regulator[46] and

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into the custody of another person for transmission . . . ."); *Regulation of Money Transmitters in Texas: An Overview*, TEXAS DEP'T OF BANKING, http://www.banking.state.tx.us/news/speeches/2004/11-10-04sp.htm#texasregulations (noting that "the overriding focus is consumer protection").

[38] *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64.

[39] *See* 31 U.S.C. § 5311 (2006); *see also FinCEN's Mandate from Congress*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/statutes_regs/bsa/.

[40] *See, e.g.*, CAL. FIN. CODE § 2003(o) (West 2013); WASH. REV. CODE ANN. § 19.230.010(18) (West 1961). *But see* NEV. REV. STAT. ANN. §§ 671.010, 671.040(1) (LexisNexis 2009) (generally regulating the business of "receiving for transmission or transmitting money" without otherwise defining the scope of such activity).

[41] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-1203 (2007); COLO. REV. STAT. ANN. § 12-52-105 (West 2010); UNIF. MONEY SERV. ACT § 103 cmt. 1, 7A U.L.A. 184 (2006) (noting five exemptions that are typically available).

[42] *See, e.g.*, N.Y. BANKING LAW § 641(1) (McKinney 1939); WASH. REV. CODE ANN. § 19.230.030 (West 1961); UNIF. MONEY SERV. ACT § 201, 7A U.L.A. 186 (2006) (setting forth the licensing requirement).

[43] *See infra* Part I.A.3.

[44] While state money transmitter statutes differ from jurisdiction to jurisdiction, there have been efforts to achieve more uniformity. Recognizing that existing state regulation is "extremely varied," the National Conference of Commissioners on Uniform State Laws has advanced the Uniform Money Services Act of 2000, which regulates money services business like money transmission. To date, only 6 states have enacted some form of the Uniform act. *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64 (2006); *Legislative Fact Sheet—Money Services Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Money%20Services%20Act. As a result there is little uniformity amongst state money transmitter laws.

[45] *See, e.g.*, CAL. FIN. CODE § 2003(s); UNIF. MONEY SERV. ACT § 102(14), 7A U.L.A. 178 (2006).

[46] *See, e.g.*, IDAHO CODE ANN. § 26-2903(1) (2000) (requiring a license from the Director of the Idaho Department of Finance to engage in money transmission business); 205 ILL. COMP. STAT. ANN. 657/10 (West 2007) (requiring a license from the Director of the Illinois Department of Financial

comply with other requirements imposed on licensed money transmitters.[47] Unlicensed money transmission is flatly prohibited unless a valid exemption applies[48] and is punishable by both criminal and civil penalties.[49] When analyzing whether a specific activity is regulated under a state money transmitter statute the key considerations are: (1) whether the activity falls within the definition of money transmission; and (2) whether a statutory exemption exists to remove the activity from the ambit of the statute. In the absence of an applicable exemption, any activity that otherwise falls within the definition of "money transmission" is potentially subject to the scrutiny of state regulators.[50]

1. The Definition of Money Transmission Under State Law

Most states attempt to define the scope of regulation by way of a broadly inclusive statutory definition.[51] The definitions set forth in the Arizona and Maryland statutes are illustrative of the breadth that is often found. Arizona defines "transmitting money" as "the transmission of money *by any means* including . . . by payment instrument, wire, facsimile, internet or any other electronic transfer, courier or otherwise."[52] In Maryland, the term "money transmission" is defined as "the business of selling or issuing payment instruments or stored value devices, or receiving *money or monetary value*, for transmission to a location within or outside the United States *by any means*, including electronically or through the Internet."[53]

Institutions to engage in money transmission business); N.Y. BANKING LAW § 641(1) (generally requiring a license in order to engage in the business of receiving money for transmission or transmitting the same); WASH. REV. CODE ANN. § 19.230.030 (requiring a license in order to engage in the business of money transmission or to hold oneself out as providing money transmission); UNIF. MONEY SERV. ACT § 201, 7A U.L.A. 186 (setting forth the licensing requirement).

[47] *See infra* Part I.A.3.

[48] *See, e.g.*, IDAHO CODE ANN. § 26-2904; 205 ILL. COMP. STAT 657/15; *Money Services Act Summary*, UNIFORM LAW COMMISSION, http://uniformlaws.org/ActSummary.aspx?title=Money%20Services%20Act [hereinafter *Money Services Act Summary*] (acknowledging that the act is broadly inclusive).

[49] *See supra* note 32.

[50] *See* Hurh & Luce, *supra* note 30 ("Government representatives from both civil and criminal enforcement agencies shared cautionary tales of both new and established companies that learned the hard way about the broad applicability of state money transmitter licensing laws."); *Money Services Act Summary*, *supra* note 48.

[51] *See, e.g.*, IDAHO CODE ANN. § 26-2902(11); 205 ILL. COMP. STAT 657/5. *But see* NEV. REV. STAT. ANN. § 671.010 (LexisNexis 2009); NEV. ADMIN. CODE § 671.005–.100 (2010) (regulating the business of transmitting money or credits without providing a statutory definition or any other guidance as to the intended scope of regulation, which results in ambiguity and the possibility of the statute being narrowly or broadly construed).

[52] ARIZ. REV. STAT. ANN. § 6-1201(17) (2007) (emphasis added).

[53] MD. CODE ANN., FIN. INST. § 12-401(m)(1) (LexisNexis 2011) (emphasis added).

Instead of narrowly defining the types of businesses that constitute money transmitters (e.g., money transfer services directed toward consumers), the Arizona and Maryland statutes, like many other state money transmitter laws, depend on a sweeping definition that is constrained by few explicit limits.[54] The definitions do not appear to be concerned with the volume of money transmission or the method by which the transmission is accomplished.[55] In addition, the statutes do not apply solely to the transmission of money (typically defined as a medium of exchange that is authorized or adopted by the United States or a foreign government).[56] Instead, the scope has been expanded to encompass the transmission of monetary value (typically defined as a medium of exchange, whether or not redeemable in money).[57] The only explicit limitation within the definition itself is the requirement that the money transmitter provide money transmission as a business.[58] Therefore, despite definitional differences between jurisdictions,[59] money transmission arguably encompasses almost any commercial activity where money is taken from one person or place and delivered to another.[60] California state regulators have quite literally adopted such an approach, acknowledging the use of a plain language test to guide decisions on whether a particular business model or technology falls within the scope of regulation.[61] Under this test, if a person takes money (or value) from person *A* and pays it to person *B* on behalf of person *A* then the activity is subject to regulation.[62] A broadly inclusive construction has also been supported by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in its uniform act to address money services business like money transmission.[63] Accordingly, money transmitter laws are not strictly limited o regulating traditional money transfer businesses like Western Union. Instead, a variety of business models from courier services to Internet and mobile payment services such as PayPal and Square could conceivably fall within the scope of regulation.

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[54] *See* ARIZ. REV. STAT. ANN. § 6-1201(17); MD. CODE ANN., FIN. INST. § 12-401(m)(1).

[55] *See* ARIZ. REV. STAT. ANN. § 6-1201(17); MD. CODE ANN., FIN. INST. § 12-401(m)(1). *But see* UNIF. MONEY SERV. ACT § 102(14), 7A U.L.A. 178 (2006) (defining "money transmission" broadly as "selling or issuing payment instruments, stored value, or receiving money or monetary value for transmission" but excluding any "delivery, online or telecommunications services, or network access" from its scope, which appears to exclude entities that solely provide delivery services (presumably courier or package delivery services) and entities that act as mere conduits for the transmission of data (such as internet service providers)).

[56] *See* UNIF. MONEY SERV. ACT § 102(11), 7A U.L.A. 178 (2006).

[57] *See id.* § 102(12), 7A U.L.A. 178 (2006); *see also id.* § 102, cmt. 10 (noting the expansion of the definition of money such that it is inclusive of anything that (1) serves as a medium of exchange and (2) places the customer at risk of the provider's insolvency while the medium is outstanding).

[58] *See supra* note 55.

[59] *See, e.g.*, MICH. COMP. LAWS ANN. § 487.1003(c) (West Supp. 2013) (defining "money transmission services" as "selling or issuing payment instruments or stored value devices or receiving money or monetary value for transmission"); N.J. STAT. ANN. § 17:15C-2 (West 2001) (defining "money transmitter" as "a person who engages in this State in the business of: (1) the sale or issuance of payment instruments for a fee, commission or other benefit; (2) the receipt of money for transmission or transmitting money within the United States or to locations abroad by any and all means, including but not limited to payment instrument, wire, facsimile, electronic transfer, or otherwise for a fee, commission or other benefit; or (3) the receipt of money for obligors for the purpose of paying obligors' bills, invoices or accounts for a fee, commission or other benefit paid by the obligor").

[60] *See* Thomas, *supra* note 30 (discussing the use of a plain-English test by California regulators); *see also infra* Part II (providing examples of the wide range of activities and business models that may fit within the plain language definition of "money transmission").

[61] *Id.*

2. *Exemptions from Regulation Under State Law*

Given the potentially expansive scope of money transmission, each state's list of exemptions exists as the only meaningful mechanism for ensuring that a particular activity is excluded from regulation. The state-specific nature of money transmitter statutes makes generalization difficult. However, there is some minimal level of commonality.[64] State money transmitter statutes often exempt "money transmission" when conducted by certain categories of persons.[65] The most common exemptions are for: (1) the federal and state government;[66] (2) those making transfers on behalf of the government or in connection with government benefits;[67] (3) regulated banks and financial institutions;[68] (4) authorized agents or delegates of a licensed money transmitter;[69] and (5) the United States Postal Service.[70] As such, only a lucky few—usually the government[71] and those operating in heavily regulated industries[72]—will be able to take advantage of an exemption.[73] Exempt persons generally may engage in what would otherwise be categorized as "money transmission" without a license and without complying with the regulatory requirements imposed on licensed money transmitters.[74]

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[62] *Id.*

[63] *See Money Services Act Summary*, *supra* note 48.

[64] *See* UNIF. MONEY SERV. ACT § 103, cmt. 1, 7A U.L.A. 184 (2006).

[65] *See, e.g.*, N.Y. BANKING LAW § 641(1) (McKinney 1939); WASH. REV. CODE ANN. § 19.230.020 (West 1961).

[66] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-1203(A)(1)–(2) (2007); COLO. REV. STAT. ANN. § 12-52-105 (West 2010); D.C. CODE § 26-1003(a)(1), (3) (2001); FLA. STAT. ANN. § 560.104(2)–(3) (West 2012).

[67] *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-609(4) (West 2011); D.C. CODE § 26-1003(a)(5).

[68] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-1203(B)(1); COLO. REV. STAT. ANN. § 12-52-105; CONN. GEN. STAT. ANN. § 36a-609(1)–(2); D.C. CODE § 26-1003(a)(4); FLA. STAT. ANN. § 560.104(1); GA. CODE ANN. § 7-1-681 (2004).

[69] *See, e.g.*, D.C. CODE § 26-1003(b); GA. CODE ANN. § 7-1-681; KY. REV. STAT. ANN. § 286.11-003(2) (LexisNexis Supp. 2010); N.Y. BANKING LAW § 641(1); WASH. REV. CODE ANN. § 19.230.030(b) (West 1961).

[70] *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-609(3); D.C. CODE § 26-1003(b); GA. CODE ANN. § 7-1-681.

[71] *See, e.g.*, UNIF. MONEY SERV. ACT § 103(1), (2), (3), (5), 7A U.L.A. 183 (2006).

[72] *See id.* § 103(4), (6), (7), (8), (10), 7A U.L.A. 184.

[73] *See id.* §§ 103(1)–(10), 201, 7A U.L.A. 183–86.

Perhaps recognizing the practical implications of a broadly inclusive definition coupled with a limited number of exemptions, certain states have incorporated additional exemptions. While the availability of such exemptions may be limited, they provide additional certainty by explicitly eliminating certain activities from regulation. For example, some states exempt money transmission by: (1) an incorporated telegraph or cable company so long as the money received is immediately transmitted;[75] (2) a courier service;[76] (3) an agent or authorized delegate of a person who is exempt from the statute;[77] (4) an agent of a payee (i.e., someone who is authorized by the principal to whom a payment is made to receive and transfer such payment to the principal);[78] or (5) money transmissions that are incidental to and a necessary part of a lawful business.[79]

The impact of new technology on the manner in which money is transferred amongst multiple parties by way of bookkeeping entries in lieu of physically delivering a tangible form of payment has also spurred the adoption of additional exemptions. Certain states have recognized the potential for money transmitter regulations to apply in the contexts of: (1) clearing and settling credit/debit card transactions;[80] and (2) issuing stored value devices such as gift cards.[81] To clarify the scope of regulation in these new contexts, some states have adopted limited exemptions that appear to apply where the risk of consumer loss is minimal. For example, the exemption for money transmission in connection with clearing or settling credit/debit card transactions only applies where the person transfers money between exempt persons (i.e., financial institutions) who are otherwise subject to a comprehensive regulatory regime.[82] Likewise, the issuer of a stored-value device can only take advantage of an exemption in a closed-system where the gift card is redeemable only for goods or services from the merchant who issues the card and not in an open-system where the card is redeemable broadly at a number of different merchants.[83] Even so, many states have done little to address the treatment of new and emerging payment mechanisms such as stored value, electronic currency, and mobile wallets under money transmitter laws.[84]

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[74] *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-1203 (2007); FLA. STAT. ANN. § 560.104 (West 2012); NEV. REV. STAT. ANN. § 671.020 (LexisNexis 2009). In some cases, only limited exemptions are available. For example, authorized agents of a licensed money transmitter are typically exempt from the licensing requirements and must comply with other regulatory requirements. *See, e.g.*, WASH. REV. CODE ANN. §§ 19.230.120, 19.230.130–40, 19.230.180, 19.230.230–40, 19.230.290.

[75] *See, e.g.*, COLO. REV. STAT. ANN. § 12-52-105 (West 2010); NEB. REV. STAT. § 8-1003(2) (1997); NEV. REV. STAT. ANN. § 671.020(1)(c).

[76] HAW. REV. STAT. ANN. § 489D-4 (LexisNexis2012) (defining "money transmission" as not applicable to courier services).

[77] Some states exempt authorized delegates of an exempt person, such as a bank or agents of a licensed money transmitter from the need to apply for and obtain a license. *See* TEX. FIN. CODE ANN. §§ 151.003(5), 151.302(a)(2) (West 2013). As such, licensed money transmitters may conduct money transmission through authorized delegates by complying with certain additional regulatory requirements designed to ensure that the principal retains responsibility for the acts of the authorized delegate. *See id.* § 151.403. However, agents of licensed money transmitters may be precluded from further delegating to another unlicensed person. *See, e.g.*, WASH. REV. CODE ANN. § 19.230.010(4) ("A person that is exempt from licensing . . . cannot have an authorized delegate.").

[78] *See, e.g.*, NEV. REV. STAT. ANN. § 671.040(2) (permitting agents of a payee to engage in money transmission); N.Y. BANKING LAW § 641 (McKinney 1939) (permitting agents of a payee to engage in money transmission); OHIO REV. CODE ANN. § 1315.01(G) (West Supp. 2013) (defining the term "transmit money" as not including "transactions in which the recipient of the money or its equivalent is the . . . authorized representative of the principal in a transaction for which the money or its equivalent is received, other than the transmission of money or its equivalent").

[79] *See, e.g.*, KAN. STAT. ANN. § 9-511 (2001).

[80] These states typically exempt "operators of a payment system" but only to the extent that they provide processing, clearing, or settlement services *between entities exempt from the state's money transmitter laws*. *See, e.g.*, OKLA. STAT. ANN. tit. 6, § 1512(6) (West Supp. 2013); OKLA. ADMIN. CODE

As illustrated by the foregoing, state money transmitter statutes contain state-specific nuances. However, the statutory language is often broadly worded such that they may be deemed to regulate a wide variety of business activities unless a statutory exemption applies. Statutory exemptions vary by state but only apply to a narrow set of enumerated persons, potentially leaving a great deal of activity subject to regulation.

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§ 85:15-1-3(9) (2012); IOWA CODE ANN. § 533C.103 (West 2011); MICH. COMP. LAWS ANN. § 487.1004(i) (West Supp. 2013); WASH. REV. CODE ANN. § 19.230.020(9). As such, the exemption typically applies to organizations that provide clearing and settlement services, which involve the transfer of funds from one participating financial institution's bank account to another (e.g., the debiting and crediting of accounts). *See* UNIF. MONEY SERV. ACT, § 103, cmt. 2, 7A U.L.A. 184–85 (2006).

[81] *See, e.g.*, IND. CODE ANN. §§ 28-8-4-3.5, 28-8-4-13, 28-8-4-15, 28-8-4-19.5, 28-8-4-20(a) (West 2010); WASH. REV. CODE ANN. §§ 19.230.010(6), 19.230.020(12).

[82] *See supra* note 80.

[83] *See supra* note 81. For a discussion of the distinction between open-systems such as prepaid cards issued by a financial institution like Visa, MasterCard, and American Express and closed-systems such as gift cards issued by a specific retailer to be used for purchases directly from the retailer, see Philip Keitel, *The Laws, Regulations, Guidelines, and Industry Practices That Protect Consumers Who Use Gift Cards*, FED. RES. BANK OF PHIL. 2–3 (July 2008), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2008/D2008 JulyGiftCard.pdf. In addition to open and closed systems, there are hybrid systems of stored value such as semi-closed stored value cards that can be used at multiple merchants in a specified location—for example, a mall gift card that can be used at all retailers located in the mall. *See* Mark Furletti, *Prepaid Card Markets & Regulation*, FED. RES. BANK OF PHIL. 4 (Feb. 2004), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2004/Prepaid_ 022004.pdf.

[84] *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 164 (2006) ("For the majority of States, [the Uniform Money Services Act] will provide a new approach to the treatment of stored value and electronic currency at the state level.").

3. Compliance Requirements Under State Law

In the absence of an applicable exemption, state money transmitter laws purport to regulate any activity that falls within the definition of money transmission.[85] Those that engage in money transmission must apply for and obtain a license from the applicable state regulator.[86] In addition, licensed money transmitters are subjected to state-specific regulatory requirements that primarily seek to ensure the financial security of those who provide money transmitter services to consumer customers.[87] The failure to obtain a license or otherwise comply may result in both civil and criminal penalties.[88]

In order to obtain a license, a prospective money transmitter must submit an application along with certain personal, business, and fitness-related information regarding the applicant and the business.[89] The state regulator generally makes the decision to grant or deny the application for a license on the basis of: (1) the application; (2) an investigation of the applicant's financial condition and responsibility, financial and business experience, competence, character, and general fitness; and (3) in some cases, an on-site examination.[90] In connection with the licensing process, the applicant must also pay various fees, which may include an application fee, an annual license fee, and the costs of regulatory assessments and investigations.[91] While the process is relatively benign, the burdens and costs of obtaining licensure under state laws increase exponentially where a money transmitter must navigate the process in multiple jurisdictions (i.e., subjecting to regulation under every state licensing regime in which the person wishes to engage in the business of money transmission).[92]

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[85] *See* Hurh & Luce, *supra* note 30 (noting that panelists at the annual Emerging Payments Systems conference "reminded participants that 'money transmission' is broadly defined to encompass any and all means of transmitting funds, with limited exceptions under various state and federal laws and regulations"); *Money Services Act Summary*, *supra* note 48.

[86] *See, e.g.*, IDAHO CODE ANN. § 26-2903(1) (2000); 205 ILL. COMP. STAT. ANN. 657/10 (West 2007); N.Y. BANKING LAW § 641(1) (McKinney 1939); WASH. REV. CODE ANN. § 19.230.030 (West 1961).

[87] The financial security requirements generally include an obligation to provide a surety bond, which varies in amount depending on the state. *See, e.g.*, COLO. REV. STAT. ANN. § 12-52-107(1)(a) (West 2010). In addition, licensed money transmitters must typically satisfy a state-specific minimum net worth and may also be required to maintain a minimum amount of permissible investments. *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-603 (West 2011); D.C. CODE § 26-1004 (2001).

[88] *See, e.g.*, 18 U.S.C. § 1960 (2006); MD. CODE ANN., FIN. INST. §§ 12-429, 12-430 (LexisNexis 2011).

[89] *See, e.g.*, WASH. REV. CODE ANN. § 19.230.040.

[90] *Id.* § 19.230.070.

[91] *Id.* § 19.230.320; *see also* 205 ILL. COMP. STAT. ANN. 657/45; KY. REV. STAT. ANN. § 286.11-021 (LexisNexis Supp. 2010).

[92] *See* UNIF. MONEY SERV. ACT § 201, cmt., 3 U.L.A. 192–93 (2006) (noting that state law governs jurisdictional decisions regarding whether a person is engaging in the business of money transmission and that factors such as targeting customers in the state may be relevant).

Licensed money transmitters must also comply with regulatory requirements aimed at protecting the public by ensuring that money transmitters have sufficient resources to honor their obligations to consumer customers[93] and giving the state regulator sufficient supervisory power and insight into the licensee's business to identify problems and pursue enforcement actions.[94] While the specific requirements vary widely from state to state, licensed money transmitters must typically: (1) furnish a surety bond or similar security device;[95] (2) satisfy minimum net worth requirements;[96] (3) maintain minimum levels of specified types of permissible investments (e.g., government obligations and other low-risk investments);[97] (4) retain specified business records for statutorily mandated periods of time;[98] and (5) file annual and periodic reports relating to financial condition and upon the occurrence of significant events.[99] In addition, licensed money transmitters must open their business up for audit and investigation by the regulatory agency overseeing compliance.[100] Those who fail to comply face administrative action with both criminal and civil consequences, ranging from imprisonment to monetary penalties.[101] In addition to penalties under state law, federal laws regulating money transmission make it a crime, punishable by a monetary penalty or imprisonment, to operate as a money transmitter without complying with applicable state licensing requirements.[102]

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[93] The primary purpose of requiring delivery of a surety bond (or other security), along with the imposition of minimum net worth and minimum permissible investment levels, is to ensure that the money transmitter has sufficient resources to honor its obligations to its customers. *See* UNIF. MONEY SERV. ACT § 204, cmt., 7A U.L.A. 192–93 (2006); *id.* § 207, cmts. 1–2, 7A U.L.A. 196–97.

[94] *See, e.g.*, *id.* § 605, cmt. 1, 7A U.L.A. 192 (2006).

[95] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 6-1205(A), 6-1205.01 (2007) (imposing minimum bonding and net worth requirements); COLO. REV. STAT. ANN. § 12-52-107(1)(a) (West 2010) (requiring bond of $1,000,000, which may be decreased to no less than $250,000 based on financial condition); CONN. GEN. STAT. ANN. §§ 36a-602, 36a-604 (West 2011) (imposing minimum bonding and net worth requirements); D.C. CODE § 26-1007(a) (2001) (requiring that licensed money transmitters furnish a surety bond of $50,000 plus $10,000 per each additional location, not to exceed $250,000); KAN. STAT. ANN. § 9-509(b)(2)–(3) (Supp. 2012) (requiring deposit of cash or securities with the state treasurer or an approved bank in the amount of $200,000 which can be increased to a maximum of $500,000 depending on financial condition, or alternatively the delivery of a surety bond in the same amount); UNIF. MONEY SERV. ACT § 204, 7A U.L.A. 192 (2006) (requiring that each prospective licensee deliver a surety bond, letter of credit or similar security device in the amount of $50,000 plus $10,000 for each additional location, not to exceed $250,000, when applying for a license, and noting that the amount of security can be raised to a maximum of $1,000,000 if necessitated by the licensee's financial condition).

[96] *See, e.g.*, D.C. CODE § 26-1004 (requiring a minimum net worth, at all times, of not less than $100,000 plus $50,000 for each additional location or authorized delegate, not to exceed $500,000); KAN. STAT. ANN. § 9-509(b)(1) (requiring a minimum net worth, at all times, of not less than $250,000); UNIF. MONEY SERV. ACT § 207, 7A U.L.A. 196 (2006) (requiring that each licensee maintain a minimum net worth of at least $25,000).

[97] *See, e.g.*, CONN. GEN. STAT. ANN. § 36a-603; KY. REV. STAT. ANN. § 286.11-015(1) (requiring a licensed money transmitter to maintain minimum permissible investments of no less than the aggregate amount of all of its outstanding payment instruments).

[98] *See, e.g.*, KY. REV. STAT. ANN. § 286.11-029 (requiring licensed money transmitters to maintain and preserve certain books and records for five years); MICH. COMP. LAWS ANN. § 487.1025 (West Supp. 2013) (requiring licensed money transmitters to maintain certain records for three years); UNIF. MONEY SERV. ACT § 605, 7A U.L.A. 214–15 (2006) (requiring that each licensee maintain extensive records for a period of three years).

[99] *See, e.g.*, FLA. STAT. ANN. § 560.118(2)(a) (West 2012) (requiring filing of annual financial statements and quarterly reports); *id.* § 560.126 (requiring written notice of significant events); IOWA CODE ANN. § 533C.205(2) (West 2011) (requiring submission of an annual renewal report); *id.* § 533C.503 (requiring filing of quarterly reports, and additional reports upon occurrence of certain material changes and other specified events); UNIF. MONEY SERV. ACT § 206(b), 7A U.L.A. 195 (2006) (requiring that each licensee submit a renewal report, including its audited annual financial statement,

The regulatory implications of being subject to state money transmitter laws can be onerous and costly. Licensees must not only bear the direct costs of licensing and renewal, but also bear the expense of establishing a program to ensure compliance with ongoing requirements such as reporting. The state-specific nature of money transmitter laws only increases the burden of compliance.

B. *Federal Regulation of Money Transmission*

While the primary thrust of this Article centers on state money transmitter laws, a brief overview of federal regulation of money transmission is both enlightening and useful. Federal regulation of money transmission was enacted pursuant to the BSA.[103] The requirements of the BSA are set forth in the text of the BSA and in the implementing

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or submit to an examination when requesting its annual license renewal); *id.* § 603, 7A U.L.A. 211–12 (requiring submission of reports following material changes); *id.* § 604, 7A U.L.A. 213–14 (2006) (requiring that each licensee provide the state regulator with a notice and request for approval of any proposed change in control); *id.* § 606, 7A U.L.A. 216 (requiring that each licensee file all necessary reports under federal and state money laundering laws).

[100] *See, e.g.*, MD. CODE ANN., FIN. INST. §§ 12-421, 12-423, 12-424 (LexisNexis 2011) (allowing the commissioner to require an audit by a certified public accountant and permission to conduct an investigation of books and records or an on-site investigation); IOWA CODE ANN. § 533C.501(1) (West 2011) (giving the state regulator the right to conduct an annual examination); UNIF. MONEY SERV. ACT §§ 601–02, 7A U.L.A. 210–11 (2006) (granting the state regulator authority to conduct, at the licensee's cost, an annual examination and additional examinations if the regulator believes that the licensee is engaging in unsafe or unsound practices or is otherwise violating the statute).

[101] *See, e.g.*, MD. CODE ANN., FIN. INST. § 12-429 (imposing a civil penalty of up to $1,000 for the first violation of the Maryland money transmitter law and $5,000 for each subsequent violation); *id.* § 12-430 (classifying each knowing violation of the Maryland money transmitter law as a felony punishable by imprisonment for up to five years and a criminal fine of $1,000 for the first violation and $5,000 for each subsequent violation); UNIF. MONEY SERV. ACT § 803, 7A U.L.A. 224–25 (2006) (granting the state regulator the power to issue cease and desist orders); *id.* § 804, 7A U.L.A. 225 (granting the state regulator the power to enter into consent orders to resolve any matters under the Act); *id.* § 805, 7A U.L.A. 226 (granting the state regulator the authority to assess civil penalties of $1,000 per day for each outstanding violation plus costs and attorneys fees); *id.* § 806, 7A U.L.A. 226 (imposing criminal penalties for certain intentional or knowing violations of the Act).

[102] 18 U.S.C. § 1960 (2006).

[103] *See* 31 U.S.C. § 5311; 31 C.F.R. §1010.100 (2012); *see also FinCEN's Mandate from Congress*, *supra* note 39.

regulations promulgated by the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury.[104] The BSA seeks to regulate financial institutions and other financial businesses by requiring them to assist U.S. government agencies in detecting and preventing money laundering.[105] Accordingly, the purpose of the BSA is distinct from the statutory purpose of state money transmitter laws because the BSA is wholly unconcerned with protecting consumers from suffering a monetary loss. Notwithstanding the divergent statutory purpose, there are some similarities, including: (1) a broadly inclusive definition of money transmission;[106] (2) the requirement of registration with the proper regulatory agency;[107] and (3) the imposition of regulatory requirements,[108] including civil and criminal penalties for noncompliance.[109]

1. The Definition of Money Transmission Under Federal Law

Like state money transmitter laws that require licensing, the BSA requires money transmitters to register with the Secretary of the Treasury.[110] The regulated activity of money transmission is defined as a component part of the term "financial institution."[111] The BSA itself simply provides that the term "financial institution" includes any "licensed sender of money or any other person who engages as a business in the transmission of funds."[112] The implementing regulations of the BSA go a step further and provide that the term "financial institution" includes any money services business.[113] Money transmitters are one of seven different types of money services businesses.[114] Money transmitters are broadly defined in the implementing regulations as: (1) any person that accepts "currency, funds, or other value that substitutes for currency from one person and [transmits the same] to another location or person by any means";[115] or (2) "[a]ny other person engaged in the transfer of funds."[116] Thus, the federal definition, like most state definitions, is broadly inclusive and potentially encompasses any activity where a person accepts and then transfers the money to another place or location.[117] While traditional money transfer businesses such as Western Union fall within this definition, a host of other business models also appear to fit within the plain language of the definition (e.g., couriers delivering money or monetary value, the delivery of payments using an Internet-based systems such as PayPal).

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[104] *See supra* note 103.

[105] *See FinCEN's Mandate from Congress*, *supra* note 39; *see also* Glenn R. Simpson, *Easy Money: Expanding in an Age of Terror, Western Union Faces Scrutiny — As Fund-Transfer System Grows in Risky Parts of the World, U.S. Questions Oversight — How 9/11 Hijackers Got Paid*, WALL ST. J., Oct. 20, 2004, at A1, *available at* http://online.wsj.com/article/SB109823529279550190.html (discussing how Western Union's money transfer servicers were used to support terrorism and money laundering).

[106] *See* 31 C.F.R. §1010.100(ff).

[107] *See* 31 U.S.C. § 5330 (requiring registration of all money transmitters); 31 C.F.R. § 1022.380 (requiring that all money transmitters register with FinCEN regardless of whether or not the money transmitter is already licensed with any State).

[108] Due to the BSA's focus on detecting and preventing money laundering, the regulatory compliance requirements naturally focus on reporting and record keeping. *See, e.g.*, 31 U.S.C. § 5313 (requiring submission of reports in connection with certain transactions for the payment, receipt, or transfer of United States coins, currency, or other monetary instruments); *id.* § 5326 (granting authority for the federal regulator to impose additional recordkeeping requirements).

[109] *See* 31 U.S.C. §§ 5321–22.

[110] *Id.* § 5330; *see also* 31 C.F.R. § 1022.380.

[111] *See* 31 U.S.C. § 5312(a)(2)(R).

[112] *Id.*

[113] *See* 31 C.F.R. § 1010.100(t)(3).

2. *Exemptions from Regulation Under Federal Law*

Given the sweeping definition of money transmission and the use of a facts-and-circumstances test to make the ultimate determination,[118] a potentially regulated person must look to the enumerated exemptions for guidance.[119] Like state money transmitter laws, the BSA excludes money transmission by categories of persons already subject to regulatory oversight, including banks and any person regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.[120] However, while many state statutes have not yet modernized their money transmitter statutes to address technological advances,[121] the federal regulations contain more robust exemptions.

The exemptions found in FinCEN's implementing regulations show an understanding of the potential for money transmitter laws to implicate a host of electronic payment and delivery mechanisms. As such, the term money transmitter does not include any person who only:

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[114] Currency dealers or exchangers, check cashers, issuer of traveler's checks or money orders, providers of prepaid access, money transmitters, the U.S. Postal Service, and sellers or prepaid access all constitute money services businesses under the BSA's implementing regulations. *See* 31 C.F.R. § 1010.100(ff)(1)–(7).

[115] *Id.* § 1010.100(ff)(5)(i)(A).

[116] *Id.* § 1010.100(ff)(5)(i)(B).

[117] *Id.* §§ 1010.100(ff)(5)(i)(A), 1010.100(ff)(5)(ii); *see also* Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43585-01 (July 21, 2011) (codified at 31 C.F.R. pt. 1010, 1021 and 1022) (noting that there is no activity threshold applicable to money transmitters).

[118] 31 C.F.R. § 1010.100(ff)(5)(ii).

[119] *See id.* § 1010.100(ff)(5)(ii)(A)–(F) (enumerating exclusions to the defined term "money transmitter"); *id.* § 1010.100(ff)(8) (enumerating exclusions to the defined term "money services business").

[120] *Id.* § 1010.100(ff)(8).

[121] *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64 (2006).

> (A) Provides the delivery, communication, or network access services used by a money transmitter to support money transmission services;
> (B) Acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller;
> (C) Operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions. . . .
> (D) Physically transports currency . . . or other value that substitutes for currency as a person primarily engaged in such business, such as an armored car, from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency . . . or other value at any point during the transportation; . . .
> (E) Provides prepaid access; or
> (F) Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.[122]

Thus, federal law appears to take a more progressive approach toward addressing the scope of regulation in light of technological advances in the payments industry. In doing so, federal law specifically exempts any person who simply provides a delivery mechanism that is used by a money transmitter to effectuate the acceptance and transfer of money.[123] As such, providing the Internet service used by a money transmitter to accept and transfer currency will not subject the internet service provider to regulation. Federal law also appears to exempt the receipt and transfer of money in certain specified situations, where the money transmission generally supports the operation of a modern payment and financial system.[124] Specifically, federal law exempts: (1) any seller who receive and transmit money in connection with facilitating the sale of their products or services;[125] (2) any third party who acts as a payment processor by accepting and transferring a payment in connection with facilitating a purchase via an agreement with the seller;[126] and (3) any provider of stored value regardless of whether the system is open-loop or closed-loop.[127] Therefore, federal money transmitter laws have outpaced state law counterparts when it comes to incorporating exemptions to clarify the scope of regulation as applied to new payment technologies.

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[122] 31 C.F.R. § 1010.100(ff)(5)(ii)(A)–(F).

[123] *Id.* § 1010.100(ff)(5)(ii)(A).

[124] *See id.* § 1010.100(ff)(5)(ii)(B)–(F).

[125] *Id.* § 1010.100(ff)(5)(ii)(F).

[126] *Id.* § 1010.100(ff)(5)(ii)(B).

3. Compliance Requirements Under Federal Law

Absent an exemption, any person that constitutes a money transmitter under the BSA must be registered[128] and comply with additional regulatory requirements. Given the focus on detecting and preventing money laundering, the BSA foregoes regulation focused on financial security in favor of comprehensive reporting and recordkeeping obligations.[129] Reports must be filed after the occurrence of certain events.[130] Reportable events include: (1) any transaction in currency in excess of $10,000;[131] (2) any instance where currency in excess of $10,000 is physically transported from abroad into the United States or vice versa;[132] and (3) the occurrence of any other suspicious transaction.[133] Money transmitters must also comply with the recordkeeping requirements set out in Subpart D of 31 C.F.R. § 1010 by both making and maintaining appropriate records in connection with certain transactions.[134] While federal money transmitter regulation does not impose obligations to provide surety bonds and similar financial security devices or involve the burdens of compliance with differing rules across jurisdictions, federal regulation does nonetheless impose arduous recordkeeping and reporting requirements.

II. THE POTENTIALLY EXPANSIVE REACH OF REGULATION

The sweeping statutory definition of money transmission under state law and the relative lack of exemptions lead to practical problems for any person that is engaged in any activity that involves the receipt of money or a payment for transfer to another person or location. Under state law, money transmission can be reasonably interpreted as extending far beyond traditional money transfer businesses like Western Union who are primarily engaged in the business of taking possession of and delivering money on behalf of consumers.[135] While the extension of money transmitter laws to new ways of providing money transfer services (e.g., Western Union's use of the Internet to accept and transfer money on behalf of consumer customers), money transmitter laws potentially encompass everything from bike messengers delivering a check to any number of Internet and mobile payment services that take payment information from a buyer and deliver payment to the merchant seller.[136] In both cases, the service provider is taking what amounts to money or monetary value under statute (e.g., the check or the credit/debit card information) and transferring it to another person.

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[127] *Id.* § 1010.100(ff)(5)(ii)(E).

[128] *See* 31 U.S.C. § 5330 (2006); 31 C.F.R. § 1022.380.

[129] *See* 31 C.F.R. § 1010.300.

[130] *Id.* §§ 1010.306, 1010.310–.311, 1010.320, 1010.330, 1010.340, 1010.350, 1010.360, 1010.370.

[131] *Id.* §§ 1010.310–.314, 1022.310–.314.

[132] *Id.* § 1010.340.

[133] *Id.* §§ 1010.320, 1022.320.

[134] *Id.* § 1010.400.

A. Traditional Money Transfer Businesses

The definition of money transmission clearly covers traditional money transfer businesses like Western Union.[137] Since there is little doubt that state money transmitter laws regulate such enterprises, money transfer businesses have historically applied for licenses and conformed to the requirements imposed by money transmitter laws.[138] Money transfer businesses like Western Union provide various money transfer services to consumer and business customers.[139] As a general matter, customers engage the money transfer business to take possession of funds, which are provided by the customer, and deliver the funds to a person designated by the customer who is located in another city, state, or country.[140] The money transfer business plainly receives and transfers money to another location or person as a service provider for the customer. In exchange for this service, the money transfer business is paid a fee by the customer.[141] Thus, traditional money transfer businesses clearly fall within the scope of regulation.

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[135] *See, e.g.*, United States v. Cambio Exacto, S.A., 166 F.3d 522, 524–25 (2d Cir. 1999) (describing money transmitters in the traditional sense as an entity in the "business of sending money: collecting it from customers and, for a commission, delivering it to a designated recipient, typically in another country" and describing the process by which such transfer occurs as involving reliance "on independent agents at both ends of each transaction." Specifically, "[c]ustomers give local agents the money they want sent; the agents then notify the money transmitter of the transaction and deposit the funds to be transferred in the transmitter's bank account. Similarly, to physically turn over the funds to the recipient, money transmitters use entities doing business in the recipient's vicinity. When performing that function, they are known as correspondents. To expedite the delivery process, correspondents sometimes distribute funds to the recipients before the amount actually arrives from the money transmitter.").

[136] *See infra* Part II.A–C.

[137] *See About Us*, W. UNION, http://corporate.westernunion.com/about.html (last visited October 1, 2013) (describing the money transfer services provided by Western Union to its customers).

[138] *See State Licensing*, W. UNION, http://ir.westernunion.com/investor-relations/corporate-governance/state-licensing/default.aspx (last visited October 1, 2013) (listing the various state money transmitter licenses that Western Union currently holds).

[139] *See Business Solutions*, W. UNION, http://business.westernunion.com/ (last visited Oct. 1, 2013) (discussing business solutions provided by Western Union); W. UNION, http://www.westernunion.com/home (last visited Oct. 1, 2013) (discussing consumer services provided by Western Union).

[140] *See Foreign Exchange Business Solutions*, W. UNION, http://business.westernunion.com/overview/ (last visited Oct. 1, 2013) (describing how businesses can send payments to suppliers); *Send Money Online*, WESTERN UNION, http://www.westernunion.com/us/send-money/send-money-online.page? (last visited Oct. 1, 2013) (describing how consumer can send

Originally, money transfers were accomplished via a wire transfer through an intercontinental telegraph system, which required that a customer physically go to a telegraph office to deliver the funds for transfer.[142] Likewise, the customer's designated recipient was forced to travel to a telegraph office to receive the funds.[143] While customers can still travel to a physical location to make a money transfer,[144] technological advances have expanded the available delivery mechanisms. Customers can now initiate a money transfer over the phone or on the Internet.[145] Instead of delivering physical currency, the customer provides the functional equivalent in the form of credit/debit card information or bank account information to the money transfer business, which electronically transfers the value to the customer's designated recipient.[146] Notwithstanding changes in the way that money transfers may be accomplished, the broadly inclusive nature of state money transmitter laws, which explicitly govern transfers by "any means," rightfully allows for the continued regulation of new ways of providing the same old money transfer services.[147]

B. Incidental Money Transfer

While the breadth of state money transmitter laws appropriately allows for the regulation of traditional money transfer businesses along with new

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money). *But see Get More from Your Billing & Payment Strategy*, W. UNION, http://payments.westernunion.com/ (last visited Oct. 1 2013) (describing how Western Union now offers payment services to business which facilitates the receipt and delivery of payments from customers to the business).

[141] *See supra* note 140; *see also Compare and Price Western Union Services*, W. UNION, https://wumt.westernunion.com/WUCOMWEB/shoppingAreaAction.do?method=load&nextSecurePage=Y&ShoppingType=2 (last visited Oct. 1, 2013) (describing pricing for certain Western Union services).

[142] *See* Salil K. Mehra, *Paradise is a Walled Garden? Trust, Antitrust, and User Dynamism*, 18 GEO. MASON L. REV. 889, 941 (2011) (discussing the development of Western Union's telegraph based money transfer system); Eric G. Roscoe, *Taxing Virtual Worlds: Can the IRS PWN You?*, 12 U. PITT. J. TECH. L. & POL'Y 1, 28 (2011) (noting that the way to wire money historically was to wire it through Western Union).

[143] *See supra* note 142.

[144] *Send Money in Person*, W. UNION, http://www.westernunion.com/us/send-money-in-person (last visited Oct. 1, 2013).

[145] *See Send Money by Phone*, W. UNION, http://www.westernunion.com/send-money-by-phone (last visited Oct. 1, 2013); *Send Money Online*, W. UNION, http://www.westernunion.com/send-money-online (last visited Oct. 1, 2013).

[146] *See supra* note 145.

[147] *See supra* note 145.

ways of providing the same service,[148] the definition of "money transmission" also implicates other enterprises that may only be involved in the receipt and transfer of money as an incidental part of its primary business. For example, the U.S. Postal Service, United Parcel Service, Federal Express, couriers, bike messengers, and others are primarily involved in providing delivery services to customers. Nonetheless, customers may on occasion request delivery of packages that contain currency or other monetary value such as checks, money orders, and gift cards. Because the service provider receives remuneration for the delivery, the service could be deemed the business of receiving money for the purpose of transferring it to another person or location.[149] While most states exempt the U.S. Postal Service,[150] few states provide an exemption applicable to delivery services generally.[151] Moreover, state money transmitter laws typically do not contain a minimum activity threshold before regulation is triggered or otherwise limit regulation to those who have actual knowledge that money is being transported.[152] As such, the breadth of the statute and the lack of clearly applicable exemptions leave couriers and other delivery services that may only occasionally deliver money within the plain language of the statute's regulatory scope. The foregoing is illustrative of the potential applicability of state money transmitter laws to business models other than the money transfer businesses that have historically been regulated.

C. New and Emerging Payment Systems

While the broadly inclusive nature and lack of applicable exemptions has potential implications for delivery services and other businesses that occasionally engage in money transfers, no business sector is more impacted than the burgeoning Internet and mobile payment services industry. The adoption of new technology has changed the way that consumers and businesses send and receive payments in connection with the purchase and sale of goods and services. Increasingly, commerce is shifting from a paper-based payment system reliant on cash and checks to electronic modes of payment.[153] Credit cards and debit cards have to some degree replaced paper currency.[154] Gift cards have to some degree replaced paper gift certificates.[155] Consumers can send electronic payments through a variety of providers over the Internet in lieu of sending a check.[156] The advent of mobile payment systems has also enabled the use of smartphones as a payments mechanism.[157] While the business models and functionalities differ, all of the following arguably involve the receipt of money or a payment by a third-party service provider for ultimate delivery to an independent seller of goods or services in connection with concluding a purchase and sale transaction: (1) the provision of stored value and gift cards; (2) the provision of payment processing services for third-party sales on a hosted marketplace like the Amazon Marketplace and various mobile application stores; (3) the provision of shopping cart or check-out functionality, such as PayPal or Google Checkout, for use by a merchant seller in connection with website sales; (4) the provision of mobile wallets, such as Google Wallet and LevelUp, that give merchant sellers the ability to accept payment information from a customer's smartphone; and (5) the provision of hardware and related mobile payment processing services, such as Square and LevelUp, which give merchants the ability to use their own smartphone to accept credit/debit card payments. While some states have started to address the scope of money transmitter laws with respect to stored value,[158] few states have adopted exemptions applicable to new Internet and mobile payment systems, leaving the question of scope undefined and such services potentially subject to regulation.[159]

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[148] *See supra* Part II.A.

[149] *See supra* Part I.A.1.

[150] *See, e.g.*, GA. CODE ANN. § 7-1-681 (2013).

[151] *See, e.g.*, HAW. REV. STAT. § 489D-4 (2012).

[152] *See, e.g.*, WASH. REV. CODE ANN. §§ 19.230.020, 19.230.030 (West 1961) (defining money transmission without reference to minimum activity requirements and not providing an explicit exemption for incidental money transmission).

[153] *See* Robert J. Samuelson, *The Vanishing Greenback*, NEWSWEEK, June 25, 2007, at 35.

1. *Stored Value and Gift Cards*

Given the potential costs of regulation as a licensed money transmitter, providers of stored value were quick to raise concerns about the lack of clarity regarding whether state money transmitter statutes actually applied to prepaid products.[160] The issuer of a gift card, for example, receives money from the person purchasing the gift card. An accounting of the amount paid is then loaded onto the gift card and stored electronically, which allows the holder to use the card to make purchases from any merchant who will accept it as a form of payment. As such, the issuer of the card could be construed as engaging in money transmission by receiving money from the person purchasing the card for the purpose of providing a mechanism (the gift card) that transfers money when the card is used to make a purchase from another place or location.

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[154] *See* Catherine New, *Cash Dying as Credit Card Payments Predicted to Grow in Volume: Report*, HUFFINGTON POST (June 7, 2012), http://www.huffingtonpost.com/2012/06/07/credit-card-payments-growth_n_1575417.html.

[155] *See* FEDERAL RESERVE, *supra* note 1 (discussing prepaid stored value as a replacement for paper-based payment instruments).

[156] *See infra* Part II.C.2–3.

[157] *See infra* Part II.C.4–5.

[158] *See, e.g.*, WASH. REV. CODE ANN. §§ 19.230.010(6), 19.230.020(12) (West 1961) (providing a limited exemption for stored value). *But see* NEV. REV. STAT. ANN. §§ 671.010, 671.040(1) (LexisNexis 2009) (regulating the issuance and sale of checks and the receipt of money transmission without any explicit mention of applicability to stored value).

[159] In promulgating the Uniform Money Services Act, NCCUSL noted that for many states, the uniform act would "provide a new approach to the treatment of stored value and electronic currency at the state level." *See* UNIF. MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64 (2006). Even in states that have adopted the uniform act, technology continues to outpace regulation. The uniform act was drafted in 2004 and while it clarifies, to some degree, the treatment of stored value and internet payments, the question of applicability to newer business models such as mobile payments remains unclear. *Id.*

Because of confusion in the marketplace about whether issuers of stored value were required to become licensed money transmitters, a number of states attempted to clarify the question. States that have addressed the question generally exempt issuers of stored value in a "closed-loop" system where a merchant issues a card that can only be redeemed for goods or services sold by the merchant issuing the gift card (e.g., a gift card issued by Wal-Mart that can only be used to make purchases from Wal-Mart).[161] In contrast, stored value in an "open-loop" system can be used to make purchases at many different merchants (e.g., prepaid debit cards issued by Visa that can be used at any merchant who accepts Visa or a mall gift card that can be used at any merchant located in the mall).[162] Although exemptions for issuers of stored value are not available in all states,[163] it appears that the issuers of "closed loop" stored value may be exempt in certain jurisdictions while issuers of "open loop" remain potentially subject to regulation.[164]

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[160] *See* FEDERAL RESERVE, *supra* note 1.

[161] *See, e.g.* ARIZ. REV. STAT. ANN. § 6-1201(11), (13) (2007) (excluding instruments redeemable by the issuer in merchandise or services from regulation); CONN. GEN. STAT. ANN. § 36a-596(1), (7), (14) (West 2011); D.C. CODE § 26-1001(5), (10), (12) (2001); FLA. STAT. ANN. § 560.103(11), (15) (West 2012); HAW. REV. STAT. § 489D-4 (2012); IDAHO CODE ANN. § 26-2902(11), (13) (2000); 205 ILL. COMP. STAT. ANN. § 657/5 (West 2007); IND. CODE ANN. § 28-8-4-3.5, 13, 15, 19.5 (West 2010); IOWA CODE ANN. § 533C.102(15), (17) (West 2011); KAN. STAT. ANN. § 9-508(c), (e), (g), (j) (Supp. 2012); KY. REV. STAT. ANN. § 286.11-003(7), (16), (22), (28) (LexisNexis Supp. 2010); ME. REV. STAT. ANN. tit. 32, § 6102(10), (12) (1999); MD. CODE ANN., FIN. INST. § 12-401(l), (n), (p) (LexisNexis 2011); MICH. COMP. LAWS ANN. § 487.1003(c), (e), (i) (West Supp. 2013); MINN. STAT. ANN. § 53B.03(07), (13), (15) (West 1946); N.H. REV. STAT. ANN. §§ 399-G:1(IX), (XIV), 399-G:4 (LexisNexis 2011). *But see* LA. REV. STAT. ANN. § 6:1032(5) (2005) (regulating the sale and issuance of stored value without any exclusions).

[162] *See* Eniola Akindemowo, *Contract, Deposit or E-Value? Reconsidering Stored Value Products for a Modernized Payments Framework*, 7 DEPAUL BUS. & COM. L.J. 275, 281 (2009).

[163] *See supra* note 161.

[164] *Id.*

2. *Online Marketplaces and App Stores*

While states have started to address the question of whether state money transmitter laws regulate stored value, much less progress has been made toward modernizing such statutes to account for online marketplaces and mobile applications.[165] Money transmitter regulation is potentially implicated when a person: (1) hosts an online marketplace or mobile application store where merchants gather to sell their products; and (2) provides payment processing services to the merchants in connection with sales made. Such a service arguably falls within the scope of money transmitter regulation because the service provider is receiving credit/debit card payment information from customers who wish to make a purchase and subsequently facilitates delivery of the payment to the merchant selling the product. [166]

For example, the Amazon Marketplace is a hosted site where merchants congregate to peddle their wares on Amazon.com[167] to over 4 million unique daily visitors.[168] Amazon is not the seller, but instead acts as a service provider to facilitate sales by independent merchants. The merchant agrees to pay Amazon a fee, which may include a monthly subscription fee, a referral fee equal to a percentage of the sale price, and for certain types of products, a fixed fee per item.[169] In exchange, Amazon allows the merchant to sell on Amazon.com and handles all of the payment processing and settlement for the merchant's sales.[170] In doing so, Amazon acts on behalf of the merchant, accepting payments from the merchant's customers (usually via a credit or debit card), and subsequently settling with the merchant for all sales made through the marketplace by paying the merchant an amount equal to the purchase price less any applicable fees.[171] Thus, the providers of online marketplaces like the Amazon Marketplace arguably accept money in the form of payment card information from the customer for the purpose of delivering to another place or location—to the banks processing the transaction and ultimately to the merchant.

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[165] *See supra* note 159.

[166] *See e.g.*, MD. CODE ANN., FIN. INST. § 12-401(l).

[167] *Sell on Amazon*, AMAZON, http://www.amazonservices.com/content/sell-on-amazon.htm?ld=AZSOAMakeM#!how-it-works (last visited Sept. 30, 2013); *see also* Allison Howen, *Getting Started Selling on Amazon*, WEBSITE MAGAZINE (Jan. 30, 2012), http://www.websitemagazine.com/content/blogs/posts/archive/2012/01/30/getting-started-selling-with-amazon.aspx; Kelly K. Spors, *How to Sell on Amazon and eBay*, N.Y. TIMES (Dec. 2, 2009), http://www.nytimes.com/2009/12/03/business/smallbusiness/03marketplaces.html?pagewanted=all&_ moc.semityn.www.

[168] WEBSITE STATISTICS, http://stats.website.org/amazon.com (last visited Sept. 30, 2013).

[169] *Start Selling Online—Fast*, AMAZON, http://www.amazonservices.com/sell-on-amazon/media-fees.htm (last visited Oct. 1, 2013).

[170] *See Sell on Amazon*, AMAZON SERVICES, http://www.amazonservices.com/content/sell-on-amazon.htm/ref=footer_soa?ld=AZFSSOA (last visited Oct. 1, 2013).

[171] *See Sell on Amazon: Frequently Asked Questions*, AMAZON, http://www.amazonservices.com/selling-on-amazon/faq.htm (last visited Aug. 28, 2013) (noting that Amazon settles with the merchant every 14 days and describing the pricing options available for sellers who wish to sell on Amazon).

Mobile application stores are similarly susceptible to being covered by the plain language of state money transmitter laws. While Apple, Android, Samsung, T-Mobile, and many others manufacture and sell smartphones on different mobile platforms, they often rely on independent software developers to create apps for use on those smartphones.[172] Everything from games like Angry Birds to photo sharing apps like Instagram is sold via various online and mobile app stores specific to a particular mobile platform like Apple's iOS.[173] Customers who wish to buy an app pay (usually via credit/debit card or acceptance of a charge to the customer's monthly phone bill) the operator of the app store (e.g., Apple).[174] After receiving payment from the buyer, the app store operator settles with each developer by paying them the purchase price for all of the apps that have been sold minus any applicable transaction fees owed.[175] Like the operator of an online marketplace, the app store operator could be construed as an intermediary who receives payment from buyers on behalf of the developer-seller in connection with the sale of the app, ultimately transferring such payment to the developer-seller. Therefore, like online marketplaces, the activities of app store operators may satisfy the technical definition of money transmission under state law. While such an outcome may seem patently ridiculous in what could be analogous to a reseller/distributor scenario, the application of the broadly inclusive statute and the plain language test advanced by some regulators highlights the potentially wide-ranging types of business models that may be impacted.

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[172] *See* David Streitfeld, *As Boom Lures App Creators, Tough Part Is Making a Living*, N.Y. TIMES (Nov. 17, 2012), http://www.nytimes.com/2012/11/18/business/as-boom-lures-app-creators-tough-part-is-making-a-living.html?pagewanted=all&_r=0 (describing how independent developers create and distribute apps); Jenna Wortham, *The iPhone Gold Rush*, N.Y. TIMES (Apr. 3, 2009), http://www.nytimes.com/2009/04/05/fashion/05iphone.html?pagewanted=all (describing the successful development and distribution of the iShoot app by Ethan Nicholas, an independent app developer); *see also Android Developers*, ANDROID, http://developer.android.com/index.html (last visited Sep. 3, 2013) (providing information to independent developers who wish to design apps for Android).

[173] *See* Doug Aamoth, *50 Best iPhone Apps 2012*, TIME (Feb. 8, 2012), http://techland.time.com/2012/02/15/50-best-iphone-apps-2012/#slide/all/?&_suid=1360964955591021777601781511185; *see also* Joanna Sibilla Taatjes, Note, *Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps*, 45 CONN. L. REV. 357, 361–62 (2012) (noting that apps are downloaded from an app store hosted by the maker of the smartphone).

[174] *See, e.g.*, ANDROID, *supra* note 11 (describing payment options for customers who wish to buy apps).

[175] *See, e.g.*, *Android Developer—Transaction* Fees, GOOGLE PLAY, http://support.google.com/googleplay/android-developer/answer/112622?hl=en&ref_topic=15867 (last visited Aug. 28, 2013) (providing for monthly payouts and noting that the developer receives 70% with the remaining 30% of the purchase price going to the distribution partner and to pay operating fees).

3. *Shopping Carts and Checkout Services*

States have also neglected to update money transmitter laws to clarify the scope of regulation with respect to third-party service providers who operate the checkout and payment process for a merchant website.[176] Even though a customer may visit the merchant's website instead of a hosted marketplace, money transmitter regulation is potentially implicated where a third party such as PayPal,[177] Google,[178] or Amazon[179] operates the "shopping cart" or "check out" function for the merchant website, or where the merchant directs the customer to pay using a third-party service.[180] In such situations, the service provider (not the merchant) receives and processes the customer's payment in connection with ultimately facilitating the transfer of the payment to the merchant seller.

Services such as PayPal, Google Checkout, and Checkout by Amazon allow merchants to integrate a shopping cart or checkout function with the merchant's website so that a customer can make a payment directly from the merchant's website.[181] To make a purchase, customers typically initiate payment by selecting a button on the merchant's website, which directs the customer to provide payment information to the service provider to conclude the purchase.[182] As such, the service provider accepts the payment from the buyer on behalf of the merchant, subsequently transferring the payment to the merchant less any applicable fees.[183] In addition, many service providers simply give merchants the ability to send invoices and direct customers to make a payment through the service provider (e.g., a seller on eBay directing the winning bidder to pay through PayPal).[184] Given the broadly inclusive definition of "money transmission," checkout services and merchant-facing payment services offered by PayPal, Amazon, Google and others like them could all reasonably be interpreted as falling within the ambit of regulation unless a valid exemption applies.

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[176] *See supra* Part II.A.1–2.

[177] *See Merchant Services*, PAYPAL, https://www.paypal.com/us/webapps/mpp/merchant (last visited Sept. 30, 2013).

[178] *See Google Checkout*, GOOGLE, https://checkout.google.com/seller/integrate.html (last visited Sept. 30, 2013).

[179] *See Checkout by Amazon*, AMAZON, https://payments.amazon.com/sdui/sdui/business/cba (last visited Sept. 30, 2013); *Viewing Orders*, AMAZON, https://payments.amazon.com/sdui/sdui/helpTab/Checkout-by-Amazon/Managing-Orders/Viewing-Orders (last visited Sept. 30, 2013).

[180] *See Free Invoice Template*, PAYPAL, https://www.paypal.com/webapps/mpp/free-invoice-template (last visited Sep. 3, 2013) (allowing sellers to send electronic invoices to customers requesting payment via PayPal); *How to Sell Online*, PAYPAL, https://www.paypal.com/webapps/mpp/how-to-sell-online (last visited Sept. 30, 2013).

[181] *See supra* notes 177–179.

[182] *See, e.g.*, *Checkout by Amazon*, AMAZON, *supra* note 179 (illustrating the payment process).

[183] *Id.*

[184] *See How to Sell Online*, PAYPAL *supra* note 180.

4. *Mobile Wallets and Mobile Payment*

Like the payment innovations discussed above, mobile wallets and other mobile payment platforms, which allow consumers to use their mobile devices to make payments, could be construed as money transmission. Where a third party provides the application that enables a customer's mobile device to store payment information and the hardware that allows a merchant to accept a customer payment via the mobile device, money transmission regulation is potentially implicated because a third party arguably receives the payment and facilitates transfer of the payment to the merchant-seller.

Some examples of mobile commerce platforms that may constitute money transmission under state law include Google Wallet,[185] Isis,[186] Square Wallet,[187] and LevelUp.[188] In addition, Merchant Customer Exchange is in the process of developing a merchant-owned mobile payment platform for participating merchants.[189] While the business models differ, each mobile payment platform essentially allows a participating merchant to accept payment from a customer's enabled mobile device. When making a purchase, the customer simply uses his or her smartphone to transmit the credit/debit card information to an in-store terminal or scanner. [190] In each case, the operator of the mobile payment platform could be deemed to be receiving money in the form of payment information from the buyer for the sole purpose of delivering it to the merchant seller.

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[185] *See Google Wallet*, GOOGLE, *supra* note 6.

[186] *See* Olga Kharif & Scott Moritz, *Isis Mobile-Payment System to Debut in September After Delays*, BLOOMBERG (Aug. 28, 2012, 2:00 PM), http://www.bloomberg.com/news/2012-08-28/isis-mobile-payment-system-to-debut-in-september-after-delays.html; *Learn how to Pay and Save with Isis*, ISIS, http://www.paywithisis.com/how.html (last visited Sept. 27, 2013) (describing how Isis allows a phone to be used for payment). At present, only certain merchants in Austin, TX and Salt Lake City, UT are capable of accepting in-store payments via Isis. *See* Kharif & Moritz, *supra*.

[187] *See Square Wallet*, SQUARE, https://squareup.com/wallet (last visited Oct. 1, 2013) (describing the functionality of Square as a mobile payment service); Willy Staley, *Starbucks and Square Announce Partnership: But Will Mobile Wallets Work Outside Coffee Shops?*, MY BANK TRACKER (Aug. 8, 2012), http://webcache.googleusercontent.com/search?q=cache:http://www.mybanktracker.com/news/2012/08/08/starbucks-square-announce-partnership-mobile-wallets-work-coffee-shops/.

[188] *See* Brian X. Chen, *LevelUp Tries Dropping the Transaction Fee for Mobile Payments*, N.Y. TIMES BITS BLOG (Jul. 12, 2012, 9:00 AM), http://bits.blogs.nytimes.com/2012/07/12/levelup-zero-scvngr/; LEVELUP, https://www.thelevelup.com/ (describing LevelUp's mobile payment app).

[189] *See* Juhi Arora, *Merchant Customers Exchange: Wal-Mart, Target, 7-Eleven, Other Big Retailers May Take to Mobile Payments*, HUFFINGTON POST (Aug. 15, 2012, 9:09 AM), http://www.huffingtonpost.com/2012/08/15/merchant-customers-exchange_n_1777791.html; MERCHANT CUSTOMER EXCHANGE, http://www.mcx.com/ (last visited Sept. 15, 2013); Jenn Webb, *Commerce Weekly: More Brands Throw in with Merchant Customer Exchange*, O'REILLY (Oct. 4, 2012), http://radar.oreilly.com/2012/10/merchant-customer-exchange-lemon-qr-codes.html.

[190] *See, e.g.*, Mark Hachman, *Isis Carrier Venture Signs Payment Deals with Visa, MasterCard, Others*, PCMAG.COM (Jul. 19, 2011, 1:49 PM), http://www.pcmag.com/article2/0,2817,2388712,00.asp (describing Isis' use of an NFC terminal to obtain payment information from the customer's phone); *Google Wallet*, GOOGLE, http://www.google.com/wallet/shop-in-stores/ (last visited Sept. 27, 2013) (describing Google Wallet's use of an NFC terminal to obtain payment information from the customer's phone); Olga Kharif, *AT&T-Verizon-T Mobile Sets $100 Million for Google Fight: Tech*, BLOOMBERG

5. *Mobile Card Readers*

One final innovative payment business model deserves mention due to the relative speed of its acceptance in the marketplace and its potential for falling within the scope of money transmitter regulation. The advent of mobile credit/debit card readers has allowed merchants to eschew the terminals provided by the credit card associations in favor of a scanner attached to the merchant's mobile device, which allows the merchant to swipe a customer's credit/debit card for payment.[191] Such devices along with the related apps effectively allow a merchant to transform its mobile device into a cash register.[192] Examples include Square, Inc.'s card reader, Square Register (launched in 2010 by Twitter co-founder Jack Dorsey and Jim McKelvey),[193] and PayPal's more recent introduction of the PayPal Here card reader.[194] Both services arguably involve the receipt of money from a buyer in the form of credit/debit card information for the purpose of payment processing and ultimately the transfer of such funds to the merchant making a sale. Like many of the other payment systems discussed above, Square Register and PayPal Here operate as a kind of third-party intermediary that receives and delivers the purchase price in connection with a purchase and sale transaction between an independent buyer and

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BUSINESSWEEK (Aug. 29, 2011), http://www.businessweek.com/news/2011-08-29/at-t-verizon-t-mobile-sets-100-million-for-google-fight-tech.html; LEVELUP, *supra* note 13 (describing LevelUp's use of a unique code and scanner system to transfer payment information); Staley, *supra* note 187 (discussing Square Wallet's use of GPS technology to transmit payment information).

[191] *See Paypal Here*, PAYPAL, https://www.paypal-promo.com/here/#welcome (last visited Sept. 15, 2013) (describing the PayPal Here scanner and app); *Square Reader*, SQUARE, https://squareup.com/reader (last visited Aug. 28, 2013); *Square Register*, SQUARE, https://squareup.com/register (last visited Sept. 15, 2013) (describing the Square Register scanner and app).

[192] *See supra* note 190.

[193] Courtney Boyd Myers, *Square Nearing $1 Billion in Processed Payments Since Launch*, THE NEXT WEB (May 25, 2011, 5:53 PM), http://thenextweb.com/gadgets/2011/05/25/square-nearing-1-billion-in-processed-payments-since-launch/Eric Savitz; *Jack Dorsey: Leadership Secrets of Twitter and Square*, FORBES (Oct. 17, 2012, 9:00 AM), http://www.forbes.com/sites/ericsavitz/2012/10/17/jack-dorsey-the-leadership-secrets-of-twitter-and-square/3/.

[194] *See* Cliff Kuang, *PayPal Launches PayPal Here, a Competitor to Square Designed by Yves Behar*, FAST COMPANY (Mar. 15, 2012, 9:15 PM), http://www.fastcodesign.com/1669277/paypal-launches-paypal-here-a-competitor-to-square-designed-by-yves-behar#1 (noting that PayPal Here was announced on March 15, 2012); *Paypal Here*, PAYPAL, https://www.paypal.com/webapps/mpp/credit-card-reader (last visited Sept. 15, 2013); Emily Price, *PayPal Takes on Square, Launches 'PayPal Here' Credit Card Reader*, MASHABLE (Mar. 15, 2012), http://mashable.com/2012/03/15/paypal-takes-on-square-launches-paypal-here-credit-card-reader/.

seller. Thus, in the absence of clearly applicable exemptions, the service could be deemed money transmission under state law.

III. THE ADVERSE IMPACT OF UNCERTAINTY ON THE PAYMENT INDUSTRY

Uncertainty abounds regarding the scope of regulation under state money transmitter laws because of the broadly inclusive definition of what constitutes money transmission and the existence of few statutory exemptions.[195] As discussed above, a host of activities other than traditional money transfer services potentially falls within the plain language of regulation.[196]

While some states have recognized the need for re-evaluation and clarification of money transmitter laws in light of innovations such as stored value,[197] far less certainty exists for the providers of other new and emerging payment services.[198] Nonetheless, the rise of Internet and mobile payment services evokes similar questions and calls for increased clarity.[199] In the absence of certainty, those who provide such services face increased transaction costs. As a result, the unsettled legal and regulatory framework has the potential to stifle ongoing payment innovation.

A. Transaction Costs

The uncertain scope of regulation needlessly increases the search and information costs of any person that currently provides a potentially regulated service or wishes to bring one to market. At present, any person that receives money or monetary value and transfers that money or monetary value to another person or location must evaluate whether his or her actions constitute money transmission under differing state laws.[200] An array of Internet and mobile payment services currently in widespread use and those that are still in development effectively involve the receipt of money by person *A* (a service provider) from person *B* (a consumer) for the purpose of transferring it to person *C* (e.g., a seller).[201] Given the lack of clearly applicable exemptions in each state,[202] potentially regulated payment service providers are left to navigate an ambiguous legal and regulatory environment when determining whether they are subject to money transmitter laws and perhaps more importantly whether a state regulator enforcing the statute will interpret the scope similarly.[203] As such, potentially regulated payment service providers must wrestle with several wholly undesirable options—either: (1) obtain a money transmitter license and bear the cost of implementing a regulatory compliance program to mitigate the risk of potential regulation and penalties for noncompliance;[204] (2) forego licensing and risk the possibility of penalties in the event that a regulator ultimately deems that the person is in fact a money transmitter,[205] or (3) stop development or provision of any potentially regulated activity until greater certainty exists.[206] Furthermore, the lack of consistency between jurisdictions compounds the problem. Those that operate in multiple states must engage in the same futile exercise of attempting to discern the applicability of each state-specific regulatory regime, including any available exemptions. In the end, it is the potentially regulated person that bears the risk of the imprecise and ambiguous nature of state money transmitter laws.

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[195] *See* Mariani, *supra* note 30; Hurh & Luce, *supra* note 30; Thomas, *supra* note 30.

[196] *See supra* Part II.

[197] *See supra* Part II.C.

[198] *See supra* Part II.C.

[199] In addition to the outcry over the lack of certainty and consistency in the application of state money transmitter laws to Internet and mobile payment products, it should be noted that some have challenged the constitutionality of such state statutes. *See* Complaint at 4, Think Computer Corp. v. Venchiarutti, No. CV 11-05496 HRL, 2011 WL 7941050, at *4 (N.D. Cal. Nov. 14, 2011), *available at* ia600805.us.archive.org/15/items/gov.uscourts.cand.247574/gov.uscourts.cand.247574.1.0.pdf (challenging the constitutionality of the 2010 California Money Transmission Act). While questions of constitutionality are beyond the scope of this Article, the wide-ranging impact of state money transmitter laws on a system of modern commerce utilizing Internet and mobile payments is highlighted by the Think Computer Corporation lawsuit.

[200] *See* Hogan, *supra* note 30; Mariani, *supra* note 30.

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[201] *See supra* Part I; *see also* CAL. FIN. CODE § 2003(o) (West 2013) (broadly defining money transmission); Thomas, *supra* note 30 (discussing the use of a plain-English test).

[202] *See supra* Part II.

[203] *See* Mariani, *supra* note 30; Andrea Lee Negroni, *Risky Business: State Regulation of Money Transmitters*, CLEAR NEWS (Spring 2003), http://www.goodwinprocter.com/~/media/Files/Publications/Attorney%20Articles/2003/Risky_Business_State_Regulation_of_Money_Transmitters.ashx (describing PayPal's struggle with money transmission regulation, evolving from an assumption that their business model was unregulated to obtaining state money transmitter licenses in numerous jurisdictions); Thomas, *supra* note 30.

[204] *See* Sean Sposito, *Facebook Fast-Tracks Its Payments Business*, AMERICAN BANKER (Feb. 21, 2012, 3:09 PM), http://www.americanbanker.com/issues/177_35/facebook-credits-money-transmitter-license-bank-regulation-1046825-1.html (noting that Facebook has recently become licensed under several state money transmitter laws). Even though Facebook has obtained licenses, uncertainty remains regarding the applicability of money transmitter laws to Facebook's evolving payments product. *See* Brittany Darwell, *Facebook Obtains Money Transmitter Licenses in 15 States*, INSIDE FACEBOOK (Feb. 22, 2012), http://www.insidefacebook.com/2012/02/22/facebook-obtains-money-transmitter-licenses-in-15-states (Facebook's S-1 filing contains the following statement: "Depending on how our Payments product evolves, we may be subject to a variety of laws and regulations . . . including those governing money transmission, gift cards and other prepaid access instruments, electronic funds transfers, anti-money laundering, counter-terrorist financing, gambling, banking and lending, and import and export restrictions. In some jurisdictions, the application or interpretation of these laws and regulations is not clear.").

[205] *See* Think Computer Corp., *supra* note 20, at 16–17 (discussing its decision to shut down a mobile payment system in light of threats of incarceration by the Department of Financial Institutions for operating without a licenses); *see also* Hurh & Luce, *supra* note 30 (Regulators warned conference participants of "both new and established companies that learned the hard way about the broad applicability of state money transmitter licensing laws.").

[206] *See* Mariani, *supra* note 30 (concluding that startups may be dissuaded from innovating in light of the unsettled legal environment and potential costs of regulation); Thomas, *supra* note 30 (noting the chilling effect of broad money transmitter laws on innovation).

The following examples show how potentially regulated persons can opt to deal with the uncertain scope of state money transmitter laws. PayPal long struggled with the question of money transmitter licensing,[207] but ultimately became licensed under state law.[208] Other companies such as Facebook have also opted to become licensed in anticipation of offering payment products that may evolve in a way so as to fall within the potentially sweeping scope of money transmitter laws.[209] Those that mistakenly determine that their business model does not constitute money transmission or who are not aware of the money transmitter regulation can face significant risk. The case of Think Computer Corporation's ("Think") FaceCash mobile payment system is illustrative. Think operated the system until it was forced to shut down due to the California Department of Financial Institution's threatened enforcement actions and penalties, including incarceration.[210] Think claims that it shut down the business because of its inability to secure the information necessary to apply for a license, highlighting a perception that state regulatory discretion in the license application process results in inconsistent results for applicants.[211] Most recently, Square's payment service was scrutinized by the Illinois Department of Financial and Professional Regulation, which issued a cease and desist order alleging violations of the state's money transmitter law.[212] Despite the potentially broad application of money transmitter laws, the foregoing instances of regulatory enforcement actions at the state level appear to be isolated events rather than a component part of an attempt to clearly define the scope of such laws and consistently enforce regulatory requirements either at the state level or nationally.

As evidenced by the foregoing examples, state money transmitter laws increase transaction costs by virtue of an unsettled legal and regulatory environment. In addition to the costs and burdens of complying with state-specific regimes, potentially regulated persons suffer from greatly increased information and search costs when trying to independently evaluate the applicability of state laws. This is due to the lack of clear guidance regarding their scope. Moreover, there are real risks for failing to "properly" interpret the statutory scope because regulatory enforcement actions and penalties may follow. In the absence of clear guidance, it is the potentially regulated that unfairly bear the burdens and risks.

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[207] *See* Negroni, *supra* note 203.

[208] *Paypal State Licenses*, PAYPAL, https://www.paypal-media.com/state_licenses.cfm (last visited Sept. 30, 2013); *see also* MISS. DEP'T OF BANKING, CONSUMER ACTIVE COMPANIES WITH DATE LAST EXAMINED—SORTED BY REGION—COMPANY TYPE: MONEY TRANSMITTER (2013), *available at* http://www.dbcf.state.ms.us/documents/lists/moneytransmitter.pdf.

[209] *See* Darwell, *supra* note 204; Sposito, *supra* note 204.

[210] *See* Think Computer Corp., *supra* note 20.

[211] *Id.*

[212] *See* Cease and Desist Order, No. 13 CC 208, State of Ill. Dep't of Fin. and Prof'l Regulation, Dep't of Fin. Inst., *available at* http://www.idfpr.com/dfi/CCD/Discipline/SquarePersonifiedCDOrder13CC208.pdf (noting the penalties and fines imposed on Square for violations of the Illinois money transmitter law); Ken Yeung, *Square Served Cease and Desist Order in Illinois for Violating the Transmitters of Money Act*, THE NEXT WEB (Mar. 1, 2013, 7:37 PM) http://thenextweb.com/insider/2013/03/01/square-receives-cease-and-desist-from-illinois-regulators/ (noting that the Illinois Department of Financial & Professional Regulation recently issued Square a cease and desist order for violating the state's money transmitter law).

B. *Stifling Innovation*

While the problems of ambiguity stemming from state money transmitters affect all persons engaging in activities that fall within the definition of money transmission, the providers of Internet and mobile payment services are particularly sensitive to the need for clarity regarding the scope of regulation. Given the exponential growth of Internet and mobile payment volume[213] and the stream of new payment services that may fall within the plain language of regulation,[214] it is not surprising that the payments industry, attorneys advising potentially regulated payment services, and business media have expressed concerns over the potential impact of an uncertain regulatory environment on continued development of innovative business models and called for greater clarity on the scope of state money transmitter laws.[215] Those who recognize the failings of state money transmitter laws to clearly address new payment innovations question whether the lack of clarity will stifle ongoing innovation.[216] The costs of evaluating whether compliance is necessary, the actual costs of becoming licensed and otherwise satisfying the regulatory requirements, and the risks of operating without a license may all act as a deterrent to those who wish to develop payment innovations. Large companies may have the resources needed to: (1) investigate and gather information before making an informed decision on licensing; (2) become licensed and comply with ongoing regulatory requirements; or (3) simply mitigate risk by becoming licensed.[217] However, start-ups may not have the same resources or ability to mitigate risk.[218] Accordingly, many may elect to wait until the regulatory requirements are more settled.[219] Therefore, the impact of uncertainty may disproportionately impact start-ups, acting as a barrier to entry and stifling new payment innovations.[220]

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[213] *See supra* notes 2–4.

[214] *See supra* Part II.

[215] *See supra* note 30.

[216] *Id.*; *see also* Thomas P. Brown, Lecturer, Berkeley Law Sch., Univ. of Cal. & Partner, Paul Hastings LLP, Before the Banking and Finance Committee, California State Assembly (March 11, 2013), *available at* http://www.law.berkeley.edu/files/bclbe/TPB_Banking__Finance_Committee_Testimony_(final).pdf?utm_source=March+2013+Update&utm_campaign=February+2013+Update&utm_medium=email (discussing the California Money Transmitter Act and its effect on innovation).

[217] Mariani, *supra* note 30; Thomas, *supra* note 30.

These concerns highlight the importance of constantly re-evaluating money transmitter laws to ensure that: (1) businesses engaging in activities potentially subject to regulation have clear guidance as to when licensing is necessary and when it is not; and (2) state regulators consistently apply regulatory oversight to only those activities, new or old, that implicate the same type of consumer protection concerns state money transmitter laws seek to mitigate.

IV. A MODERN APPROACH TO MONEY TRANSMISSION THAT RESPECTS CONSUMER PROTECTION

This Article suggests that state money transmitter laws must be recast in light of new technology in order to provide greater clarity on the scope of regulation. In doing so, the guiding principle should be to uphold the consumer protection purpose of such statutes by regulating only those activities that carry the same risk of loss as traditional money transfer services while leaving other activities unencumbered by the cost and compliance burden of becoming licensed unnecessarily.[221] When analyzing Internet and mobile payment services through the lens of consumer protection, it is evident that the extension of state money transmitter laws may be inappropriate in many instances.[222] Internet and mobile payment services that facilitate a purchase and sale transaction between a buyer and merchant seller appear to carry no more risk of loss to the consumer than in any direct purchase transaction between a buyer and merchant seller.[223] As such, the goal of preventing consumer harm in the event of nonperformance by the money transmitter is not supported by the extension of regulation.[224] Where there are few if any consumer protection gains, the extension of such laws to Internet and mobile payment services would result in a one-size-fits-all regulatory scheme that fails to differentiate between the unique risks of each potentially regulated activity. Such an approach fails to recognize current marketplace realities, specifically how commerce is and will continue to be conducted as technology advances and consumer habits change. Therefore, the extension of state money transmitter laws in the absence of a real consumer protection concern would needlessly hinder innovation to payments processes and commerce without materially advancing the statutory goals of such statutes.

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[218] Mariani, *supra* note 30; Thomas, *supra* note 30.

[219] Mariani, *supra* note 30; Thomas, *supra* note 30.

[220] Mariani, *supra* note 30; Thomas, *supra* note 30.

[221] *See infra* Part IV.A–C.

[222] *See infra* Part IV.A–B.

[223] *See infra* Part IV.A.

[224] *See infra* Part IV.B.

A. The Unique Consumer Risks of Payment Innovations

The consumer protection purpose of state money transmitter laws is not well served by extending regulation because many payment services pose little real risk of consumer loss. Because Internet and mobile payment services typically facilitate the purchase of a product or service,[225] the consumer's payment to the service provider is effectively payment to the merchant seller. As a result, the consumer is entitled to the purchased item and often takes possession of the purchased item at that time.[226] Therefore, the failure of the service provider to deliver the money to the merchant will result in a merchant loss rather than a consumer loss.[227] In the event of a dispute between the consumer and the merchant, additional protections are available to give aggrieved consumers avenues for redress.[228] Specifically, payment service providers often provide dispute resolution procedures that supplement the protections that the credit card associations provide to cardholders where a credit/debit card is used to make the purchase.[229] In short, a consumer who makes a purchase via a third-party payment service provider is at no greater risk of loss than a consumer who makes a purchase directly from the merchant.[230] Because the consumer protection concerns are far less pronounced, the statutory purpose of consumer protection is not served by levying additional regulatory compliance requirements on payment services, which do not carry the same risk of consumer harm.

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[225] *See supra* Part II.

[226] *See infra* Part IV.A.1.

[227] *See* Amy Martinez, *Amazon Sellers Complain of Tied-Up Payments, Account Shutdowns*, SEATTLE TIMES (Nov. 19, 2012, 11:55 AM), http://seattletimes.com/html/businesstechnology/2019705292_amazonseller18.html. (describing disputes between merchants and payment service providers such as Amazon and eBay); Amy Martinez, *Small Online Merchants File Suit Against Amazon.com*, SEATTLE TIMES (Mar. 15, 2013, 1:30 PM), http://seattletimes.com/html/businesstechnology/2020568463_amazonsellersuitxml.html (discussing a class action suit filed by small merchants against Amazon for withholding payments from sales of merchant products and services via Amazon's marketplace). While merchants may be dissatisfied with the payment service provider, it appears that they are not inclined to pursue any claims against the consumer purchaser. This is ostensibly a tacit if not explicit acceptance that such claims are unlikely to be successful where the merchant elects to use a particular payment service provider and directs the customer to make a purchase using such service. In those instances, common sense would indicate that the customer should not be liable for what amounts to be a dispute between the merchant and its service provider.

[228] *See infra* Part IV.A.2.

[229] *See infra* Part IV.A.2.

[230] *See infra* Part IV.A.

1. Differentiating Risk

Unlike traditional money transfer businesses that act on behalf of consumer customers in delivering money, consumers face far less risk where the money transfer is a component part of a purchase transaction. With money transfer businesses like Western Union, consumers contracted directly with the service provider, and the service provider was paid by the customer to act on behalf of the consumer in ensuring safe delivery of the customer's money.[231] In such situations, state regulators have a legitimate interest in protecting consumers from being defrauded and suffering monetary losses in the event that the money transfer business fails to follow through on its promise to deliver the consumer's money.[232] If left unregulated, insufficiently capitalized businesses without the ability to reliably perform could cause consumer losses. Moreover, those with nefarious intentions could take money for delivery along with any associated fees without any intention of actually performing. Where a service provider does not perform, the consumer will lose the funds trusted to the service provider and might have little ability to locate the funds or otherwise seek a remedy. In such circumstances, consumer protection is an appropriate regulatory concern, and money transmitter laws ably function to reduce the risk of loss by requiring a license from the state, compliance with minimum net worth requirements, and delivery of surety bonds.[233] Therefore, the imposition of state money transmitter regulations is entirely appropriate where there is a real risk of consumer losses.

In contrast, where the service provider contracts with a merchant to accept customer payments and deliver such payments to the merchant, there is much less consumer risk because the merchant engaging the service provider bears the risk of nonperformance.[234] Instead of contracting with a consumer to provide delivery services on behalf of the consumer, a payment service provider enters into a relationship with a merchant seller and agrees to accept and process customer payments on behalf of the merchant.[235] Here, the payment service provider to merchant relationship is that of agent and principal.[236] While the rights and responsibilities between the service provider and the merchant are set by private agreement,[237] the merchant could be described as engaging the service provider to accept payments on the merchant's behalf.[238] To the consumer making a purchase, delivery of payment to the service provider is effectively delivery of payment to the merchant for purpose of concluding a sale.[239] So long as the consumer receives the purchased item, the consumer will not suffer a loss, even if the service provider does not transfer the payment to the merchant in accordance with the terms of their agreement. Accordingly, the risk profile for a consumer making a purchase through a payment service designated by the merchant seller is wholly different than the situation where a consumer pays a money transfer service to take and deliver money on behalf of the consumer; the failure of delivery in the latter results in a direct loss to the consumer, whereas the failure of delivery in the former does not necessarily result in a loss.

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[231] *See* Negroni, *supra* note 203 (describing the origins of money transmitters as stemming from the early 1900s and the desire of immigrants to have a means of sending money to their native countries).

[232] *See, e.g.*, VA. CODE ANN. § 6.2-1902 (formerly cited as § 6.1-371 (2010)) (effective July 1, 2013).

[233] *See supra* Part I.A.3.

[234] *See supra* note 227.

[235] *See, e.g.*, *PayPal User Agreement*, PAYPAL, https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=ua/UserAgreement_full&locale.x=en_US (last updated Aug. 20, 2013).

Consumer customers who make in-store purchases via a mobile wallet or mobile card reader face almost no risk of loss because the consumer will often receive possession of the purchased item at the time of payment.[240] When a well-heeled gentleman purchases an Emilio Pucci necktie from Bloomingdale's, he simply taps his Google Wallet equipped smartphone to the terminal at checkout to pay and leaves the store with the necktie in hand.[241] Similarly, when a caffeine-craving CEO stops into Starbucks for a triple venti non-fat no foam vanilla latte, she simply orders at the register and gives her name to pay.[242] The GPS technology on the CEO's mobile device allows the barista to pull up the customer's name and picture to confirm the purchase, allowing the CEO to walk out with latte in hand.[243] Thus, the functionality of mobile wallets such as Google Wallet, Square, Level Up, Isis, and Merchant Customer Exchange allows for the purchaser to receive the purchased item regardless of whether there is subsequently a problem with transferring the money from the service provider to the merchant seller.

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[236] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").

[237] *See* PAYPAL, *supra* note 235.

[238] *See supra* Part II.C.

[239] For example, customers may make a purchase directly from a merchant website that utilizes a third party to accept the payment. *See, e.g.*, *Checkout by Amazon*, AMAZON, *supra* note 179. Likewise, customers often make in-store purchases directly from a merchant who may use a third party to provide payment services such as a mobile wallet or mobile card reader. *See, e.g.*, GOOGLE, *supra* note 190; *Square Register*, SQUARE, https://squareup.com/register#signature (last visited Sept. 16, 2013).

[240] Even where a customer does not immediately take possession of the purchased item (i.e. delivery at a later date), the risk to the customer is no greater than if the customer paid the merchant directly with the expectation that the purchased item would be subsequently delivered. In both situations, the customer has made a payment on the expectation of future delivery and bears some risk of nonperformance by the merchant seller. The only potential for added risk is if the third-party service provider does not transfer the payment and the merchant withholds delivery as a result. However, in most cases, the credit card is not charged until the merchant has certified shipping or delivery. *See Checkout by Amazon*, AMAZON, *supra* note 179; *see also MasterCard Rules*, MASTERCARD app. B-1 (June 14, 2013), http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf (noting that merchants generally must not submit transactions until after the products are shipped or services performed). In addition, most merchants do not pursue claims against consumers for failure of a service provider selected by the merchant to abide by the terms of their private arrangement. *See supra* note 227.

The same is true of mobile card readers like Square Register and PayPal Here. If a customer wishes to purchase a shrimp po'boy from a food truck utilizing PayPal Here, the merchant simply swipes the customer's card through a card reader plugged into the phone's audio jack.[244] The customer then signs on the screen of the smartphone to complete the purchase and can walk away happily with a meal.[245] As evidenced by the foregoing, the failure of a service provider to perform the money transmission services or any other contractual obligations agreed upon between the service provider and the merchant is unlikely to result in an adverse impact on the consumer. In such situations, there is little risk of loss because the consumer receives the purchased item at the time of payment and does not expect anything further. Instead, the risk of loss in the event of non-performance lands squarely on the shoulders of the merchant who engages the service provider.[246]

Where a consumer makes a payment via a third-party Internet or mobile payment service, there appears to be no greater risk of loss to the consumer than if the consumer were to pay the merchant directly. As might be expected, there is an implicit (if not explicit) recognition that the buyer is entitled to the purchased item upon delivery of the payment to the service provider.[247] Merchants who sell on online marketplaces like the Amazon Marketplace must often confirm shipment of the purchased item before the consumer's credit/debit card is charged by the payment service provider and funds delivered to the merchant.[248] In addition, where the purchased item is an electronic good like an app, the consumer typically obtains the ability to commence downloading the app immediately after payment.[249] Therefore, in many cases, the consumer may receive the purchased item at the time of purchase or immediately thereafter, or at least be assured of the purchased item being shipped prior to being charged.

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[241] *See* GOOGLE, *supra* note 190 (discussing the payment process and identifying Bloomingdale's as a participating merchant).

[242] *See* SQUARE, *supra* note 187 (discussing the payment and checkout process for a hands-free transaction).

[243] *Id.*

[244] *See* PAYPAL, *supra* note 194 (noting that a merchant can also manually enter the card number or use the smartphone's camera function to scan the card).

[245] *Id.*

[246] *See supra* note 227. An allocation of risk that results in the merchant bearing the risk of loss is appropriate because it is the merchant (not the consumer) who elects to engage a payment service provider and has the opportunity to evaluate the ability of the service provider to perform. The merchant will also have the opportunity to contract for and pursue any private rights and remedies in accordance with the terms and conditions of the agreement between the merchant and the seller. Thus, the merchant is not wholly without recourse. Moreover, the consumer protection concerns of state money transmitter laws do not support an extension of protections to merchants.

Even if the consumer were charged before receiving the purchased item, there would be no added risk when compared to a purchase directly from the merchant. If a consumer were to make a purchase over the Internet directly from a merchant who does not utilize a third-party payment service, the merchant would have received payment on the promise of subsequent delivery. The potential for non-delivery or delivery of a non-conforming item would still exist. With a third-party Internet or mobile payment service, the situation is no different. The consumer will have delivered payment to the service provider as directed by the merchant seller on the promise that the merchant will subsequently deliver the purchased item, leaving the consumer open to the same risk of non-delivery or nonconforming delivery. Therefore, the involvement of a third-party payment service provider does not appear to materially increase the likelihood that a consumer will suffer a loss in the event of the service provider's failure to deliver the payment to the merchant.

2. *An Added Layer of Consumer Protection*

As noted above, consumers making a payment through an Internet or mobile payment service typically receive the benefit of their bargain (i.e., the purchased item) even when the service provider fails to perform (i.e., delivery of payment to the merchant).[250] As such, there is less consumer protection concern than in a traditional money transfer business where the failure of the money transmitter to perform would result in the loss of the funds provided by the consumer. Internet and mobile payment services also mitigate the potential risk of loss with an added layer of consumer protection. Where the consumer does not receive the purchased item or is dissatisfied with the delivered item (e.g., it is not as described or arrives damaged), the service provider may also provide a dispute resolution procedure and allow the consumer to recoup the purchase price.[251] Such dispute resolution procedures supplement the protections afforded to those who make purchases with a credit card or debit card, which may give cardholders the ability to dispute or otherwise challenge charges.[252] Therefore, consumers often have an additional avenue for redress that is not available in a direct purchase and sale transaction with a merchant seller, which further mitigates the risk of consumer loss.

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[247] *See supra* note 227.

[248] *See Checkout by Amazon*, AMAZON, *supra* note 179. While there is no law that prohibits a business from submitting a credit card transaction before delivering the purchase product or performing the purchased services, such a business practice is consistent with credit card rules and regulations that generally mandate delivery before submission. *See MasterCard Rules*, *supra* note 240, at app. B-1.

[249] *See* Taatjes, *supra* note 173 (discussing the downloading of apps); *Visibility for Your Apps*, ANDROID, http://developer.android.com/distribute/googleplay/about/visibility.html (last visited Feb. 16, 2013) (discussing downloads of Android apps on the Google Play app store).

[250] *See supra* Part IV.A.1.

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[251] *See, e.g.*, *A-to-Z Guarantee Process*, AMAZON, https://payments.amazon.com/sdui/sdui/helpTab/Amazon-Flexible-Payments-Service/Resolving-Disputes/-A-to-z-Guarantee-Process (last visited Sept. 16, 2013) (describing Amazon's A-to-Z Guarantee); *Buyer Dispute Program*, AMAZON, https://payments.amazon.com/sdui/sdui/about?nodeId=6025 (last visited Sept. 16, 2013) (describing buyer protections available from Amazon); *Transaction Disputes*, AMAZON, https://payments.amazon.com/sdui/sdui/about?nodeId=5968 (last visited Sept. 16, 2013) (describing the Amazon transaction dispute process); *Chargeback Process*, GOOGLE, http://support.google.com/checkout/sell/bin/answer.py?hl=en&answer=134372 (last visited Sept. 16, 2013) (describing how purchase amounts can be charged back to the merchant); *Mediation*, GOOGLE, http://support.google.com/checkout/sell/bin/answer.py?hl=en&answer=134373 (last visited Sept. 16, 2013) (describing situations where Google will mediate disputes); *Security*, PAYPAL, https://www.paypal.com/webapps/mpp/paypal-safety-and-security (last visited Sept. 30, 2013) (describing PayPal's purchase protection program); *Security and Protection*, PAYPAL, https://www.paypal.com/us/webapps/mpp/security/seller-dispute-resolution (last visited Sept. 16, 2013) (providing guidance regarding the dispute resolution procedure for sellers); *Square Seller Agreement*, SQUARE, https://squareup.com/legal/merchant-ua (last updated June 25, 2013) (describing the merchant's liability for chargebacks for unauthorized or challenged transactions); *see also* Casey Chan, *How to Get a Refund from the App Store*, GIZMODO (Feb. 20, 2012, 5:40 PM), http://gizmodo.com/5886683/how-to-get-a-refund-from-the-app-store (describing how to pursue a refund from the Apple App Store notwithstanding terms providing for all sales to be final).

[252] Credit card transactions benefit from greater protections under Regulation Z than are available for debit card transactions under Regulation E. *See* Truth in Lending (Regulation Z), 12 C.F.R. §§ 226.12(c)(1), 226.13(d)(1) (2012) (giving credit cardholders the right to: (1) assert against the card issuer "all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute" with the merchant; and (2) withhold "any portion of any required payment that the consumer believes is related to the disputed amount"); *see also* 15 U.S.C. § 1693g (2006) (only limiting liability to debit card holders for unauthorized transactions); Ichiro Kobayashi, *Private Contracting and Business Models of Electronic Commerce*, 13 U. MIAMI BUS. L. REV. 161, 192–95 (2005) (describing protections for credit cardholders); Daniel M. Mroz, *Credit or Debit? Unauthorized Use and Consumer Liability Under Federal Consumer Protection Legislation*, 19 N. ILL. U. L. REV. 589, 603–08 (1999) (recognizing that debit cardholders benefit from less consumer protection than holders of credit cards); Neil M. Peretz, *The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union*, 16 MICH. ST. J. INT'L L. 573, 598–99 (2008) (noting that credit cardholders may have remedies even if the purchase was authorized); David E. Sorkin, *Payment Methods for Consumer to Consumer Online Transactions*, 35 AKRON L. REV. 1, 8 (2001) ("Paying by credit card affords much greater protection to a buyer than do other traditional payment mechanisms largely because of the credit card dispute rights provided by Federal Reserve Regulation Z."); Jane K. Winn, *Making XML Pay: Revising Existing Electronic Payments Law to Accommodate Innovation*, 53 SMU L. REV. 1477, 1491–92 (2000) (noting that Reg. Z "provides a simple and effective alternative dispute resolution process in the event the consumer is unhappy with the transaction").

PayPal,[253] Amazon,[254] and Google[255] all have dispute resolution procedures that facilitate the resolution of problems between sellers and buyers who utilize such services to send and receive payments. When a customer is dissatisfied with the purchase, he or she has the right to initiate a process whereby the service provider will investigate and refund the money if the customer prevails.[256] Therefore, where a seller fails to deliver a purchased item or delivers an unsatisfactory item, the consumer may have a remedy.

In addition, an aggrieved consumer who pays using a credit card or debit card has the benefit of protection under federal law[257] and credit card association operating rules.[258] Under Regulation Z, consumers have the right to assert claims against a credit card issuer with respect to certain disputes between the seller and a buyer in a consumer goods transaction.[259] Accordingly, if a consumer credit cardholder has a dispute with a merchant regarding the purchase of a consumer good, he or she can assert his or her claim against the bank that issued the credit card. Such a remedy would appear to apply regardless of whether the payment was made through a service provider or directly from a merchant. Because the protections for debit card transactions under Regulation E are much more limited, a consumer using a debit card to make a payment through an Internet or mobile payment service may have greater liability if a dispute arises.[260] However, the distinctly different treatment of credit/debit cards would appear to impact a cardholder similarly regardless of whether the payment was made directly to the merchant or if the payment was made through an Internet or mobile payment service provider.

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[253] *See PayPal User Agreement*, PAYPAL, *supra* note 235, § 13 (setting forth Protections for Buyers); *see also Buyer Complaint Process*, PAYPAL, https://www.paypal.com/cgi-bin/webscr?cmd=p/gen/buyer-complaint-outside (last visited Oct. 1, 2013); *Paypal Security and Protection*, PAYPAL, *supra* note 251.

[254] *See Amazon Payments User Agreement*, AMAZON § 3.5, https://payments.amazon.com/sdui/sdui/helpTab/Personal-Accounts/User-Agreement-Policies/User-Agreement (last updated July 10, 2013); *see also Buyer Dispute Program*, AMAZON, *supra* note 251.

[255] *See Mediation*, GOOGLE, *supra* note 251.

[256] *See supra* notes 253–255.

[257] *See supra* note 252.

[258] *See* VISA, VISA INTERNATIONAL OPERATING REGULATIONS 832–47 (Apr. 15, 2013), http://usa.visa.com/download/merchants/visa-international-operating-regulations-main.pdf (discussing the resolution of cardholder disputes); *see also* Sorkin, *supra* note 252, at 8–9 (noting that the credit card issuer can chargeback a transaction even if it does not qualify under Regulation Z).

[259] Truth in Lending (Regulation Z), 12 C.F.R. §§ 226.12(c)(1), 226.13(d)(1) (2012); *see also* Jane Kaufman Winn, *Open Systems, Free Markets, and Regulation of Internet Commerce*, 72 TUL. L. REV. 1177, 1236 (1998).

[260] Under the Electronic Funds Transfer Act, the consumer has limited liability for unauthorized transactions under Regulation E. *See* 15 U.S.C. § 1693g (2006). However, the definition of "unauthorized transaction" does not include authorized transactions where merchandise is not delivered or is nonconforming. *See* 15 U.S.C. § 1693a(12). As such, the protections available for debit cards under the EFTA are not as strong as those available for credit cards under Regulation Z. Specifically, the right to assert claims relating to a dispute with the merchant against the card issuer is much more expansive than limited protections for unauthorized transactions. *See* Sorkin, *supra* note 252, at 7–9.

Notwithstanding the limited remedies of Regulation Z,[261] consumers may have better luck disputing or challenging a charge directly with the credit card issuer.[262] Upon receipt of the complaint, the credit card issuer will temporarily credit the cardholder's account for the amount of the disputed transaction pending the results of an investigation.[263] If the dispute is resolved in favor of the cardholder, the credit remains and the amount is "charged back" to the merchant.[264] Merchants that wish to accept credit/debit cards must enter into an agreement with the credit card association (e.g., Visa or MasterCard) and agree to abide by the terms and conditions of their operating rules.[265] Included in the terms and conditions are a number of broad chargeback rights. For example, amounts may be charged back to the merchant if: (1) the merchant fails to perform the service or deliver the merchandise; (2) the merchant delivers defective or damaged merchandise; or (3) the merchant delivers merchandise that is not as described on the transaction receipt or is otherwise unsuitable for the purpose sold.[266]

As illustrated above, a consumer that uses a credit card or debit card to make a purchase via an Internet or mobile payment service at worst benefits from the same protections that are available to all credit/debit card transactions.[267] However, certain payment service providers may provide for added consumer protections in the form of buyer protection efforts to supplement those generally available for credit/debit card transactions.[268] As such, it appears that in many cases there is no greater risk of consumer loss to justify or otherwise support the extension of money transmitter regulation.

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[261] 12 C.F.R. §§ 226.12(c)(1), 226.13(d)(1).

[262] *See* Mroz, *supra* note 252 (describing the chargeback process); Sorkin, *supra* note 252, at 8–9; *see also Chargebacks & Dispute Resolution*, VISA, http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/index.html (last visited Sept. 27, 2013) (discussing the chargeback process generally and noting that a chargeback to the merchant is often triggered by a customer dispute); VISA, CHARGEBACK MANAGEMENT GUIDELINES FOR VISA MERCHANTS 29 (2011), http://usa.visa.com/download/merchants/chargeback-management-guidelines-for-visa-merchants.pdf (discussing customer dispute chargebacks).

[263] *See* VISA, CHARGEBACK MANAGEMENT GUIDELINES FOR VISA MERCHANTS, *supra* note 262, at 29.

[264] *Id.* at 32.

[265] *See* VISA, *supra* note 252, at 397 (mandating a merchant agreement).

[266] *Id.* at 831–34 (describing available chargeback rights).

[267] *See supra* note 252.

[268] *See supra* note 251.

B. Statutory Purpose Does Not Support Indiscriminate Extension

In the absence of additional consumer risk, the main purpose of money transmitter laws—to protect consumers—is not served by indiscriminately extending regulation to all third-party Internet and mobile payment service providers who accept and transfer payments on behalf of merchants. This Article suggests that a more nuanced approach would better serve the statutory purpose of state money transmitter laws by only extending regulation to those activities that implicate meaningful consumer protection concerns of the sort raised by traditional money transfer business. Instead of taking the one-size-fits-all approach of extending regulation to all activities that fall within the sweeping definition of money transmission, state money transmitter laws should be recast so as to support the statutory goal of consumer protection where appropriate and to clearly exclude other activities from regulation.

As noted above, many payment services do not materially increase the risk of loss to the consumer.[269] While the use of such services does not come wholly without risk, many consumers making payments via an Internet or mobile payment system face a risk profile that is almost indistinguishable from any other purchase and sale transaction effectuated directly between a buyer and seller without the involvement of a third-party payment service.[270] Where a payment service does not increase the risk of consumer loss, [271] the extension of regulation would not serve the purpose of state money transmitter laws.[272] As such, the regulation of such services would be inappropriate and wholly unsupported by statutory purpose.

It is important, however, to clarify that all payment services should not be wholly excluded from the ambit of money transmitter regulation. Under the approach advocated by this Article, the consumer protection purpose of state money transmitter laws should guide the scope of regulation. To the extent that new or emerging payment systems raise increased risks of consumer loss, regulation under the money transmitter law regime would be fitting. For example, Western Union's use of new technology to effectuate a money transfer on behalf of a consumer customer should continue to be regulated as a money transmission. Perhaps more illuminating is the case of PayPal. As noted above, PayPal provides a number of payment services, such as the mobile card reader PayPal Here and a checkout service for merchants, which do not appear to raise consumer protection concerns.[273] However, PayPal also offers a consumer-facing product that allows individual consumers to send money to their friends, family, and others.[274] Such a service appears to operate as the functional equivalent of a traditional money transfer business and carries with it the same potential for consumer harm. As such, under the approach advanced by this Article, PayPal would need to obtain a license and comply with state money transmitter laws. The distinction, however, is the basis for regulation. PayPal would not be subject to regulation because its varied payment service offerings to merchants can be construed as money transmission. Instead, PayPal would be deemed a money transmitter as a result of the money transfer service it provides to consumers.

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[269] *See supra* Part IV.A.

[270] *See supra* Part IV.A.

[271] *See supra* Part IV.A.

[272] *See supra* Part IV.A.

In short, the statutory purpose of consumer protection does not compel the indiscriminate application of state money transmitter laws to all Internet and mobile payment service providers. A nuanced approach that focuses on the consumer protection goals of the statute would better serve the purpose of state money transmitter laws by mandating oversight when justified by consumer protection concerns and exempting other activities from needless regulatory burdens.

C. *What About Merchant Protections?*

To the extent that payment services are provided to merchants, they appear to offer a distinctly different risk profile than services provided to consumers.[275] In such situations, the risk of loss shifts in large part from the consumer to the merchant seller.[276] While state consumer protection laws seek to provide protections for individual buyers of goods and services, it is less clear that such statutes should offer similar protections for merchants who sell goods and services.[277] The question of what protections (if any) should be available to merchants using Internet and mobile payment services is beyond the scope of this Article. However, it is clear that forcing merchant sellers to bear the entire risk of loss in the event of nonperformance of a payment service provider may be unappealing.

On the one hand, merchant sellers can be viewed as distinctly different than individual consumers. By acting in a commercial capacity to sell goods or services, merchant sellers could be reasonably expected to exercise care in selecting those who will provide payment services on their behalf. As such, merchant sellers should bear the risk of nonperformance, and are in the best position to conduct due diligence on the qualifications of the service provider and negotiate any necessary protections to guard against the risk of nonperformance.[278]

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[273] *See supra* Part III.

[274] *See Transfer Overview*, PAYPAL, https://www.paypal.com/webapps/mpp/transfer-money-online (last visited Sept. 16, 2013).

[275] *See supra* Part IV.A–B.

[276] *See supra* Part IV.A–B.

[277] *See supra* note 37.

Unfortunately, not all merchant sellers possess the same level of sophistication or bargaining power. As a result small business owners such as the sole proprietor of a food cart may in fact be viewed as more closely analogous to a consumer. If so, providing merchant protections via statute may be both necessary and appropriate in certain limited circumstances. In the absence of such additional protections, smaller merchant sellers may be particularly susceptible to significant losses (e.g., delivery of goods or services without payment) in the event of that a payment service provider does not perform. As compared to consumers, merchant sellers more appropriately bear the risk of loss.[279] Nonetheless, additional statutory protections may be warranted if simply allowing merchant sellers to sue nonperforming payment service providers to enforce contractual rights and remedies is viewed as insufficient.[280]

D. Indiscriminate Extension Needlessly Hinders Innovation and Ignores Marketplace Realities

Because the indiscriminate extension of state money transmitter laws to all Internet and mobile payment mechanisms is not supported by statutory purpose, doing so would: (1) needlessly hinder continued innovation and competition in the payments industry; and (2) wholly fail to accommodate a societal shift toward conducting commerce over the Internet and mobile platforms and using non-paper-based payment mechanisms. Instead the nuanced approach advanced by this Article clarifies the scope of regulation while appropriately recasting state money transmitter laws to accommodate technological advances and the development of innovative business models. Guidance and support for such an approach abounds. The need to ascertain the scope and applicability of existing laws and regulations in light of new and emerging technologies is nothing new.[281] In the context of money transmitter regulation at the federal level, regulators have already recognized the need to accommodate previous payment system innovations.[282] Moreover, financial laws, including in the heavily regulated banking industry, have historically been appropriately reinterpreted in light of technological changes.[283] The foregoing supports the proposition that state money transmitter laws can and should be appropriately recast in light of new ways of conducting commerce.

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[278] *See supra* note 222.

[279] *See supra* note 222.

[280] *See* Martinez, *supra* note 227 (discussing merchant law suits against nonperforming payment service providers).

[281] *See, e.g.*, Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 161–82 (S.D.N.Y. 1997) (noting that (1) judges and legislators are "faced with adapting existing legal standards to the novel environment of cyberspace," (2) the "Internet . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations," and (3) the "[r]egulation on a local [l]evel . . . will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities").

1. *Lessons from the Federal Reserve Board*

In 2005, the Federal Reserve Board addressed the lack of clear and consistent state and federal regulation of prepaid products such as gift cards, including concerns over the applicability of state money transmitter laws.[284] At the time, industry participants felt that "uncertain legal and regulatory conditions [could] stifle innovation in the industry, as compliance with an increasing number of laws and regulations, particularly at the state level, [could] make products too expensive to offer."[285] Industry participants also noted that existing regulations failed to adequately differentiate between types of prepaid products, which may have very different risk characteristics for the general public.[286] In responding to these concerns, the Federal Reserve Board concluded that: (1) significant changes were taking place in payment systems; (2) payment systems varied widely and a one-size-fits-all regulatory approach may not best fit the needs of the industry or best address the risks associated with prepaid products; and (3) regulation should not unduly hinder innovation.[287]

Just eight years later in 2013, the discussion of Internet and mobile payment systems is like déjà vu. The payments industry is rightfully expressing concern regarding the lack of clear and consistent guidance as to regulation of Internet and mobile payment systems.[288] Moreover, the speed of innovation has resulted in different business models with unique risk profiles.[289] Nonetheless, existing regulation fails to adequately differentiate Internet and mobile payment services for purposes of regulation.[290] Like the providers of prepaid products, the proponents of new and emerging payment systems rightfully fear that the lack of clarity and the costs of compliance will have a chilling effect on innovation.[291] Given the similarities, the Federal Reserve Board's 2005 conclusions may very well be an inspired utterance as to the appropriate means for reconciling the tension between potentially sweeping regulation and innovative business models. Transposing the Federal Reserve Board's conclusions to the present situation mandates the recognition of ongoing transformational change with respect to payment systems. As noted by the Federal Reserve Board, a one-size-fits-all regulatory scheme may not fit the needs of the industry or address the risks of new and emerging payment systems. Because the Internet and mobile payment services vary widely in functionality and potential risk to the general public, such an approach would be inappropriate, and would unnecessarily hinder payment innovation. In contrast, the Federal Reserve Board's conclusions support the adoption of the more nuanced approach advanced by this Article. Such an approach is flexible enough to differentiate between payment innovations and address the actual consumer risk that results from each unique payment service. Instead of needlessly hindering the growing e-commerce and mobile payment practices of the modern marketplace, this approach supports continued innovation by eliminating the costs of regulatory compliance where consumer protection is not served and by providing greater clarity as to the potential scope of regulation. As such, the Federal Reserve Board's conclusions regarding prepaid products accentuates the need for recasting state money transmitter laws in light of the real risks of each new payment innovation instead of indiscriminately extending regulation to any new innovation that falls within the plain language of the statutes.

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[282] *See* FEDERAL RESERVE, *supra* note 1; *see also* Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses, 74 Fed. Reg. 22,129-01 (proposed May 12, 2009) (to be codified at 31 C.F.R. pt. 103).

[283] *See supra* Part IV.D.2.

[284] *See* FEDERAL RESERVE, *supra* note 1.

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *See supra* note 30.

[289] *See supra* Parts II–IV.

[290] *See supra* Part IV.

2. *Lessons from Banking and Financial Regulation*

Examples of situations where regulatory requirements have been reinterpreted in light of technological advances abound. The banking industry, in particular, has constantly addressed the regulatory implications of new ways of conducting the very old business of banking.[292] As discussed below, the resolution of regulatory uncertainty can be prompted by marketplace demand. In addition, the determination of how to appropriately recast existing laws and regulations can be made on a case-by-case evaluation that takes into account the marketplace demands of both industry participants and the public.

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[291] *See supra* note 30.

[292] *See, e.g.*, Indep. Ins. Agents of Am. v. Ludwig, Inc., 997 F.2d 958 (D.C. Cir. 1993) (declining to recast a statute permitting banks located in towns having a population of 5,000 or less to sell insurance as limiting such sales to local townspeople where new technologies such as telephones and direct mailing allow for nationwide business and solicitation not contemplated by legislators in 1916); Office of the Comptroller of the Currency, Interpretive Letter No. 875 (Oct. 31, 1999) (setting forth the regulatory agency's opinion that 12 U.S.C. § 24 (2006) authorizes banks to engage in certain new Internet-related services on the basis that such activities are new ways for performing traditional bank functions or are incidental thereto); RICHARD SCOTT CARNELL ET AL., THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 198 (4th ed. 2009) (noting that Internet banking holds the potential to eviscerate any remaining limitations on geographic expansion by a bank).

The advent of the automated teller machines (ATMs) is illustrative. Historically, banking laws restricted geographic expansion and branching by banks.[293] In many states, unit banking—a requirement that state-chartered banks have only one place of doing business—was the norm.[294] Under federal law, a nationally chartered bank could only have branches in its home state and to the extent that state-chartered banks were permitted to branch under state laws.[295] The ATM created a great deal of uncertainty because it was unclear whether an ATM constituted a bank branch. Nonetheless, ATMs were broadly supported by both the banking industry and consumers on the grounds of increased convenience for the public. In the 1970s and 1980s, many state legislatures acted to liberalize branching restrictions in response to both public and industry demands.[296] At the national level, the question of whether an ATM constituted a branch remained unsettled until the National Bank Act was amended to specifically exclude ATMs from the definition of the term "branch" under 12 U.S.C. § 36(j) (2006).[297] Thus, the spread of both intrastate and interstate banking was, in part, the result of a changing marketplace that pushed for the liberalizing of branching rules to allow the operation of ATMs.[298] The case of the ATM illustrates the need to recognize marketplace realities when recasting and clarifying the appropriate scope of existing regulation.

Like the banking industry, the means of conducting commerce and making payments are prone to being impacted by technological change. When recasting money transmitter regulation, care should be taken to accommodate the growing role of Internet and mobile payment services as a preferred alternative to other payment mechanisms. As with the adoption of ATMs, the growing acceptance of such payment services in an ambiguous legal and regulatory environment highlights the importance of providing clarity regarding the scope of regulation. The nuanced approach of recasting state money transmitter laws seeks to ensure that Internet and mobile payment systems are evaluated with a critical eye and a determination made as to whether the purpose of state money transmitter laws is served by regulation. Instead of blindly extending regulation or simply bowing to marketplace demands, this Article seeks to determine the appropriate scope of such regulation in light of the unique nuances of each service and any benefits to the marketplace. Basing the determination of regulation on the extent of consumer protection concerns implicated by each unique payment service accomplishes this goal. Where the extension of regulation is not supported by consumer protection concerns, regulation would needlessly burden commerce by forcing ill-suited regulatory requirements upon innovative payment services that make purchase and sale transactions more convenient for consumers and merchants. In addition, it would needlessly raise the costs of providing such payment services and potentially reduce the incentive for continued innovations. However, if consumer protection concerns are implicated, the statutory purpose of state money transmitter laws is appropriately upheld by extending regulation. In doing so, state money transmitter laws are modernized to account for marketplace realities while simultaneously staying committed to the consumer protection goals of money transmitter regulation.

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[293] *See* Mehrsa Baradaran, *Reconsidering the Separation of Banking and Commerce*, 80 GEO. WASH. L. REV. 385, 399–400 (2012) (describing the removal of legal barriers to geographic expansion); Sharon E. Foster, *Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis*, 78 MISS. L.J. 777, 784, 786 (discussion geographic restrictions); Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking Up the Banks that are Too-Big-to-Fail?*, 62 HASTINGS L.J. 821, 831 (2011) (noting that geographic restrictions prevented concentration in banking); Frederick Tung, *Pay for Banker Performance: Structuring Executive Compensation for Risk Regulation*, 105 NW. U. L. REV. 1205, 1219 (2011).

[294] *See* Kevin J. Stiroh & Philip E. Strahan, *Competitive Dynamics of Deregulation: Evidence from U.S. Banking*, 35 J. MONEY, CREDIT & BANKING 801, 806 (2003); *see also* First Nat'l Bank in Plant City, Fla. v. Dickinson, 396 U.S. 122 (1969) (discussing Florida's unit banking statute, which only allowed banks to have one place of doing business).

[295] *See* 12 U.S.C. § 36(c) (2006).

[296] *See* CARNELL ET AL., *supra* note 292, at 25.

[297] *Id.* at 190–91.

[298] *Id.* at 25.

V. THE FRAMEWORK FOR A MODEST PROPOSAL

Because law and regulation often lag behind innovative business models, the need to consistently re-evaluate and adapt existing regulatory schemes is nothing new.[299] Given the rise of Internet and mobile payment systems,[300] it is high time that state regulators and legislators look critically at state money transmitter laws and unambiguously address the extent to which such laws apply to new methods of transferring money and making payments over the Internet and mobile networks.[301] This Article has advocated for state money transmitter laws to be modernized to account for technological changes while respecting the consumer protection purpose of such statutes.[302] Given the distinctly different risks between money transfer services provided to consumer customers and payment services provided to merchant sellers, an appropriate line of demarcation could be made by extending regulation to the former (and any new ways of conducting the former) while exempting the latter from regulation in the absence of an equivalent consumer protection rationale. To do so, this Article advances a framework for a narrowly tailored statutory exemption that builds on the "agent of a payee" exemption available under Nevada,[303] New York,[304] and Ohio[305] law that would supplement other more specific exemptions that states may enact to clarify the scope of regulation to technological advances such as stored value or payment processing. The adoption of such an exemption would provide added certainty for the payment industry while simultaneously upholding the consumer protection goals of state money transmitter laws and addressing the unique characteristics of Internet and mobile payment services.

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[299] *See* FEDERAL RESERVE, *supra* note 1; *see also* Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses, 74 Fed. Reg. 22,129-01 (proposed May 12, 2009) (to be codified at 31 C.F.R. pt. 103).

[300] *See* Richard, *supra* note 1, at 262 ("In five to ten years, the remittance industry will change greatly because of increases in the variation of service providers and transfer business models.").

[301] *See* UNIFORM MONEY SERV. ACT, prefatory note, 7A U.L.A. 163–64 (2006).

A. The Agent of a Payee Exemption

Each of Nevada,[306] New York,[307] and Ohio[308] have money transmitter laws that contain express statutory language that could be construed as precluding regulation of payment service providers who take and deliver customer payments on behalf of a merchant seller where certain conditions are satisfied.[309] These states provide for a so-called "agent of a payee" exemption. In these states: (1) no person may engage in the business of money transmission without a license; and (2) no person may engage in the business of money transmission as an agent "except as an agent of a licensee or *as agent of a payee*."[310] The foregoing requirements are somewhat unclear. However, the language regarding money transmission as an agent appears to expressly allow "agents of a payee" to engage in money transmission without a license and without otherwise being subject to the regulatory requirements of the state's money transmitter statute.[311]

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[302] *See supra* Part IV.

[303] NEV. REV. STAT. § 671.020 (2011).

[304] N.Y. BANKING LAW § 641(1) (McKinney 1939).

[305] OHIO REV. CODE ANN. § 1315.01(G) (West 2013).

[306] *See* NEV. REV. STAT. § 671.020 (appearing to exclude agents of a payee).

[307] *See* N.Y. BANKING LAW § 641(1) (appearing to exclude agents of a payee).

[308] OHIO REV. CODE ANN. § 1315.01(G) (defining the term "transmit money" as not including transactions in which the recipient of the money or its equivalent is the authorized representative of a principal in a transaction for which the money or its equivalent is received, other than transactions for the transmission of money or its equivalent).

[309] Unlike the Nevada, New York, and Ohio statutes, the Texas money transmitter law does not contain express statutory language that exempts agents of a payee from regulation. However, the Texas Department of Banking is of the opinion that payment processors who act as agents of a merchant by temporarily holding merchant funds at the end of the settlement process are exempt from licensing under the money transmitter law. *See* Tex. Dep't of Banking, Op. No. 06-01 (May 15, 2006), *available at* policy.ctspublish.com/txdob/; *see also* Tex. Dep't of Banking, Op. No. 03-01 (June 4, 2003), *available at* policy.ctspublish.com/txdob/.

The New York statute and associated regulations provide additional detail regarding the application of this exemption. Under New York law, agents of a payee include "any person authorized by a payee to receive funds on behalf of the payee and to deliver such funds received from the payor to the payee."[312] The key to qualifying for the exemption is the presence of a contractual agency relationship between the service provider and the merchant seller. According to the New York Banking Department, factors that indicate a valid agency relationship include: (1) a contract between the agent and the payee; (2) authorization for the agent to receive payments on behalf of the payee and deliver such payments to the payee; (3) a receipt from the agent to the customer indicating that payment to the agent constitutes payment to the payee; (4) the absence of risk of loss to the customer if the agent fails to remit the payment to the payee; and (5) the payee treats customers as if the payee received the payment whether or not the agent actually delivers the funds to the payee.[313] The New York Banking Department has also emphasized that the exemption only applies where delivery of funds to the agent results in no greater risk to the customer than if payment were delivered directly to the payee.[314]

While the "agent of a payee" language is not listed in the statutory exemptions section of the New York and Nevada statutes, it appears to function as such, and could be available to Internet and mobile payment service providers where the service is: (1) provided to a merchant pursuant to a valid agency agreement and (2) steps are taken to ensure that the buyer faces no greater risk of loss in delivering a payment to the service provider instead of paying the merchant directly.

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[310] *See* NEV. REV. STAT. § 671.020 (emphasis added); N.Y. BANKING LAW § 641(1); *see also* OHIO REV. CODE ANN. § 1315.01(G).

[311] *See* N.Y. Banking Dep't, Interpretive Letter (Jul. 9, 2007), *available at* http://www.dfs.ny.gov/legal/interpret_opinion/banking/lo070709b.htm.

[312] N.Y. COMP. CODES R. & REGS. tit. 3, § 406.2(1) (2013).

[313] N.Y. Banking Dep't, Interpretive Letter (April 24, 2007), *available at* http://www.dfs.ny.gov/legal/interpret_opinion/banking/lo070424.htm; *see also* N.Y. BANKING LAW § 640(10) (McKinney 1939) (defining the term agent as requiring a written agency contract, albeit in the context of agents of a licensee as opposed to agents of a payee).

[314] N.Y. Banking Dep't, Interpretive Op., *supra* note 299 (determining that agent of a payee exemption was inapplicable where a company that received student payments for prepaid meals at a secondary school did not give a receipt indicating that payment to the agent was deemed payment to the payee, and emphasizing that there "ought to be no greater risks than if the funds were delivered directly to the payee").

B. The Federal Approach

In addition to the minority of states that have adopted an agent of a payee exemption, federal laws regulating money transmission have been quick to adapt to payment innovations. In 2009, amendments clarifying the application of the BSA's money transmitter regulations to payment services were initiated.[315] The term "money transmitter" was amended to specifically exclude any person that "[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller" from the definition of money transmitter.[316] This exclusion is most likely applicable to third-party payment services offered to merchant sellers. However, it only applies to payment processors, which may be narrower than the New York and Nevada approach of exempting any agent of a payee. It is unclear whether all Internet and mobile payment services provided to a merchant would be deemed payment processors. In addition, the term "money transmitter" was amended to exclude any person that "[a]ccepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds."[317] This second exclusion appears to be focused on sellers themselves who may directly engage in money transmission when selling their own goods or services. As such, it is unlikely to be of benefit to third-party payment services not acting as sellers themselves.

When compared to the agent of a payee approach, the federal amendments provide more certainty in clearly excluding certain activities from the definition of money transmission and thus, the scope of regulation. However, because the federal approach opts to exclude very narrowly defined payment activities, any business model that does not clearly fit the description may be resigned to the same unsettled legal and regulatory landscape.

C. A Mash-Up of the State and Federal Approaches

This Article suggests that the best framework for amending state money transmitter laws to accommodate payment innovations while continuing to protect against consumer losses requires a mash-up of the "agent of a payee" approach and the amendments to the BSA. Specifically, state money transmitter laws should be amended to unambiguously exclude any agent of a payee from the definition of money transmission. In determining the availability of the exemption, the key factor would be whether the receipt and transmission of money by the agent to the payee results in any greater risk of loss to the purchaser of the good or service than a purchase and sale transaction where the payment is made directly to the seller.[318] As such, the exemption would depend on: (1) a valid written agreement with the payee/seller; and (2) enforceable terms and conditions between the agent/service provider, confirmation that the receipt of funds by the agent/service provider is deemed receipt by the payee/seller and that the payee/seller has no recourse against the purchaser for any failure of performance by the agent/service provider.[319]

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[315] *See* Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Definitions and Other Regulations Relating to Money Services Businesses, 74 Fed. Reg. 22,129-01 (proposed May 12, 2009) (to be codified at 31 C.F.R. pt. 103).

[316] 31 C.F.R. § 1010.100(ff)(5)(ii)(B) (2013).

[317] 31 C.F.R. § 1010.100(ff)(5)(ii)(F).

This framework combines the substantive inclusiveness and consumer protection focus of the "agent of a payee" approach with the clarity and drafting finesse of the amendments to the BSA. By basing the exemption on the more inclusive "agent of a payee" approach, the exemption is better able to account for the variations between different payment services and innovations while allowing consumer protection to remain the driver for regulation. In contrast to limiting the exemption to specific types of payment services like the BSA amendments, or attempting to explicitly list each and every type of exempt service, this framework allows consumer protection to exist as a guiding principle on questions of regulatory scope instead of focusing on the underlying technology, the type of service, or business model nuances. In addition to being better suited to differentiating between existing services, the "agent of a payee" approach allows for ongoing guidance with respect to new payment innovations by not being too narrowly focused.

The foregoing notwithstanding, the New York and Nevada approach suffers for not clearly exempting agents of a payee from regulation via an explicit statutory exemption or amendment to the definition of money transmission. Instead, New York and Nevada have inserted the agent of a payee language into the licensing mandate, which may result in some confusion. Therefore, this Article suggests that, like the amendments to the BSA, the agent of a payee language should be incorporated by amending the definition of "money transmission" to exclude the activity, or otherwise provide for an explicit exemption. Doing so provides for a more clearly articulated position on the scope of regulation.

It should be noted that this Article does not mean to suggest that there is no benefit to adopting activity-specific exemptions that narrowly address defined types of payment services such as stored value,[320] payment processing,[321] and money transmission by sellers where it is necessary and integral to the sale of the seller's goods and services.[322] To the contrary, targeted exemptions can and do provide added certainty regarding the question of whether regulation applies to specific payment innovations and new business models. However, such narrowly focused exemptions will be of little benefit in clarifying the scope of regulation more broadly with respect to new and emerging payment systems. As such, the agent of a payee exemption would be an ideal supplement to targeted exemptions dealing with new business models or technological advances.

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[318] *See supra* Part IV.

[319] *See supra* notes 313–314.

D. *Benefits of the Proposed Framework*

The adoption of the agent of a payee framework for an exemption would not only address the uncertain regulatory scope of money transmitter laws, but also modernize such laws to account for new and emerging forms of payment activity. Such an approach is narrowly crafted to ensure that the consumer protection purpose of state money transmitter laws is served by continuing to apply regulatory compliance requirements on those services that pose a real risk of loss, and only exempting activities that will not run afoul of the purpose of such statutes. Moreover, clarifying the scope of regulation will allow for the continued development of innovative payment mechanisms and the use of such mechanisms to facilitate the growth of commerce in a modern cashless world without burdening those in the payment industry with: (1) the cost and expense of complying with inappropriately scoped regulatory requirements; (2) the transaction costs of evaluating the scope and applicability of a statute that has yet to catch up to technological advances; and (3) the risk of uncertain application of such statutes by state regulators.

1. *Providing Much Needed Clarity*

The adoption of an exemption that clearly defines the compliance obligations of third-party payment services providers that receive funds on behalf of sellers will greatly reduce the risks facing such businesses by virtue of an uncertain legal and regulatory landscape.[323] The intentionally broad definition of "money transmission" under most state laws leaves open the very real possibility that a state regulator could elect to broadly interpret the scope of the statutory language and seek to require licensing and regulatory compliance of a number of businesses, including Internet and mobile payment systems.[324] Because few states currently have express statutory exemptions that clearly apply, there is little certainty.[325]

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[320] *See, e.g.*, WASH. REV. CODE ANN.§§ 19.230.010(6), 19.230.020(12) (West 2013).

[321] *See, e.g.*, UNIF. MONEY SERV. ACT § 103(9), 7A U.L.A. 184 (2006).

[322] *See, e.g.*, 31 C.F.R. § 1010.100(ff)(5)(ii)(F).

[323] *See supra* Part III.

In Nevada, New York, and Ohio the agent of a payee exemption appears to apply to exempt these services from regulation.[326] In one other state, Texas, these types of payment businesses may take some comfort in the presence of an interpretive opinion that may be construed to indicate the state regulator's present position that payment processing is exempt from money transmitter regulation.[327] In other states, uncertainty over potential regulation remains. Providers of Internet and mobile payment service to merchant sellers must at a minimum bear the transaction costs of evaluating the risk of potential regulation and deciding whether or not to obtain a license.[328] In addition, any person that elects to obtain a license and comply with the regulatory requirements will bear the costs of maintaining a money transmitter license and the compliance costs as an added expense of doing business.[329] Because these types of services do not result in added consumer protection concerns, the added regulatory burdens are both unnecessary and ineffectual.[330] If a license is not obtained, the risk of potential regulation and liability for noncompliance remains and may compound over time.[331]

Those who elect not to obtain a license and comply with regulatory requirements may have an argument based on statutory interpretation that money transmitter laws are inapplicable to their services. At its most basic level, the argument is that by acting as an agent for a seller of goods or services, the agent is not in fact receiving money for transmission. As an agent of a seller, receipt of funds by the agent is the equivalent of receipt of funds by the seller. Therefore, receipt of payment by the agent and subsequent delivery of funds to the seller who acts as principal is not money transmission. While this is both a reasonable and perhaps even appropriate interpretation, the possibility of regulation remains due to the breadth of most state statutes and the lack of a clearly applicable exemption or other guidance indicating that compliance is not required.[332] As evidenced by the foregoing, providers of such payment services are left in the unenviable position of having few good options when it comes to money transmitter regulation and compliance.

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[324] *See* Think Computer Corp., *supra* note 30; *see also* Hurh & Luce, *supra* note 30.

[325] *See supra* Part II.

[326] *See supra* Part V.A.

[327] *See* Tex. Dep't of Banking, Op. No. 06-01 (May 15, 2006), *available at* policy.ctspublish.com/txdob/; *see also* Tex. Dep't of Banking, Op. No. 03-01 (June 4, 2003), *available at* policy.ctspublish.com/txdob/.

[328] *See supra* Part III.

[329] *See* Sposito, *supra* note 204 (quoting Brian Riley that "[t]he pain in the neck is when you do it in all 50 states").

[330] *See supra* Part IV.

[331] *See* 18 U.S.C. § 1960 (2006); MD. CODE ANN., FIN. INST. §§ 12-429 to 430 (LexisNexis 2011); *see also* Think Computer Corp., *supra* note 30.

Given this uncertain legal and regulatory backdrop, state money transmitter laws would benefit by clarifying the scope of money transmitter regulation and answering the question of whether a host of new payment services must become licensed money transmitters.[333] As advanced by this Article, the agent of a payee framework for a new exemption succeeds in resolving this question by drawing an appropriate distinction between payment services provided to merchant sellers pursuant to a contractual arrangement that protects consumers and traditional money transfer services provided directly to consumers. The former category of services would be exempt while the latter would continue to be regulated under state money transmitter laws based on a case-by-case assessment of the risk of consumer loss.[334] Accordingly, the adoption of the proposed regulatory framework would provide the benefit of added certainty for those who provide such services, those who seek to develop similar services, and the state regulators who are tasked with enforcing the mandate of state money transmitter laws.

2. *Upholding Consumer Protection*

In addition to providing certainty, the proposed agent of a payee framework strikes an appropriate balance by allowing the breadth of state money transmitter regulation to reach new services that raise the same consumer protection concerns as traditional money transfer businesses while leaving those without the same risks free to operate without licensing and oversight.[335] The consumer protection purpose of state money transmitter laws is upheld by continuing to require licensing and regulation of traditional money transfer businesses like Western Union that provide money transfer services directly to consumer customers.[336] This would be true regardless of whether the money transfer service is provided from a brick and mortar location or electronically via the Internet or a mobile application.[337]

For example, where Western Union receives money from an individual consumer through the Western Union website and the consumer engages

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[332] *See supra* Part II.

[333] *See supra* Part IV.

[334] *See supra* Part IV.

[335] *See supra* Part IV.

[336] *See supra* Part IV.

[337] *See supra* Part IV.

Western Union to deliver the funds to a designated person or place, a money transmitter license and compliance with the state regulatory regime would be required. In such instances, the agent of a payee exemption would not apply because Western Union would not be receiving and delivering funds as an agent of a merchant seller in connection with facilitating the sale of the seller's goods and services.[338]

In contrast, where a merchant seller contracts with a third party to receive and deliver payments from the seller's customers and complies with the requirements for mitigating consumer loss, the activity would be exempt from regulation.[339] For example, if a book store contracts with Amazon Payments or PayPal to provide a mechanism for accepting online payments from a customer who wishes to purchase a book, Amazon Payments and PayPal would not be engaging in regulated money transmission so long as there were a valid contractual agreement with the book store that eliminates any risk of loss to the buyer of the book after a payment is made to Amazon Payment or PayPal, as the case may be.[340] However, Amazon Payments and PayPal can both be used by individual consumers to effectuate money transfers to designated individuals in the absence of a purchase and sale transaction.[341] In those instances, the receipt and delivery of money is no different than the use of the Western Union website. Therefore, licensing and regulation would be necessary for services like Amazon Payments and PayPal for the latter activity, but not the former.[342]

The foregoing examples illustrate how the proposed framework for an agent of a payee exemption is narrowly tailored to not only maintain regulation and licensing where appropriate due to the continued risk of consumer harm, but also to clarify the scope of the statute in light of technological advances. In doing so, the proposed framework would more appropriately respond to the risks of these activities by acknowledging and distinguishing between money transfer services provided to a consumer customer and payment services on behalf of a seller pursuant to a contractual agreement, which is inherently different. Therefore, the agent of a payee exemption operates so as to support the consumer protection purpose of state money transmitter laws.

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[338] *See supra* Part V.C.

[339] *See supra* Part V.C.

[340] *See supra* Part V.C.

[341] *See Send & Receive Money*, AMAZON, https://payments.amazon.com/sdui/sdui/personal/money (last visited Aug. 21, 2013); *Transfer Overview*, PAYPAL, *supra* note 268.

[342] *See supra* Part V.C.

3. *Accommodating Innovative Business Models, Modern Technology, and Commerce*

Finally, the proposed framework recognizes innovative business models in the payments industry and new technology while appropriately adapting existing laws to society's growing e-commerce habits instead of trying to force new payment systems into an incongruous regulatory box. By differentiating between payment services and recognizing the unique risks that each poses to consumers, the proposed framework promotes continued innovation in the payments industry, which supports the realities of a system of commerce that now relies heavily on non-cash payment methods. The providers of Internet and mobile payment services and those who continue to develop services will benefit by having an understanding of the scope of regulation and not having to unnecessarily bear regulatory burdens and costs. As such, money transmitter laws would be modernized and appropriately scoped to regulate the actual consumer protection risks implicated by changing technologies and advances in payment technologies without needlessly hindering the development of services that help to drive commercial growth in an increasingly cashless world.

CONCLUSION

State money transmitter laws, like many other statutes, suffer from an inability to predict and account for technological advances that occur in the years following enactment. Given the way that Internet and mobile payment technologies have been embraced, it is high time that state regulators and legislators look critically at state money transmitter laws and unambiguously address the extent to which such laws apply to the ever expanding ways that a person can electronically transfer money and make payments. In modernizing state money transmitter laws, it is imperative that we: (1) carefully consider and continually re-evaluate the scope of regulation in light of new services and technological innovations; (2) make an individualized determination of whether each new activity rightfully ought to be regulated as money transmission; and (3) adopt new amendments, as appropriate, to provide for clear and explicit exemptions where the consumer protection purpose of state money transmitter laws is not served.

Assuming that the consumer protection purpose of state money transmitter laws should inform decisions regarding regulatory scope, the agent of a payee exemption framework advanced in this Article strikes an appropriate balance between the potentially divergent interests of consumers and commerce. The framework provides guidance and clarity to potentially regulated persons. In addition, the framework upholds the integrity of consumer protection that underlies state money transmitter laws by extending regulation to technological advances only where appropriate. Perhaps most importantly, the framework alleviates concerns about the chilling effect on innovation by embracing and exempting payment innovations that do not implicate overt consumer protection concerns. Thus, the agent of a payee framework will assist states in taking an important first step toward appropriately modernizing existing laws to accommodate new and emerging payment systems and developing a cohesive regulatory scheme for such systems.

McQuinn, Michael@DBO

From:	Venchiarutti, Robert@DBO
Sent:	Friday, May 23, 2014 9:59 AM
To:	McQuinn, Michael@DBO
Subject:	FW: Illinois -- Proposed Legislation
Attachments:	Illinois HB 3681.pdf

Robert Venchiarutti
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From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Monday, September 30, 2013 7:05 AM
To: Venchiarutti, Robert@DBO
Subject: Illinois -- Proposed Legislation

FYI

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In Illinois, HB 3681 has been introduced to amend the Transmitters Money Act by changing the definition of "transmitting money" to exclude providing payment services to a seller of goods or services, a payee, or a payment processor in connection with the sale of goods or services, including:

- Providing payment processing services and payment settlement services,
- Acting as an agent or service provider of entities that engage in payment processing or settlement services, or
- Receiving and disbursing currency, funds, or other value as an agent of the payee.

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98TH GENERAL ASSEMBLY
State of Illinois
2013 and 2014
HB3681

Introduced , by Rep. Lou Lang

SYNOPSIS AS INTRODUCED:

205 ILCS 657/5

Amends the Transmitters of Money Act. Changes the definition of "transmitting money" to exclude providing payment services to a seller of goods or services, a payee, or a payment processor in connection with the sale of goods or services. Effective immediately.

LRB098 13680 MGM 48206 b

A BILL FOR

AN ACT concerning regulation.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Transmitters of Money Act is amended by changing Section 5 as follows:

(205 ILCS 657/5)

Sec. 5. Definitions. As used in this Act, unless the context otherwise requires, the words and phrases defined in this Section have the meanings set forth in this Section.

"Authorized seller" means a person not an employee of a licensee who engages in the business regulated by this Act on behalf of a licensee under a contract between that person and the licensee.

"Bill payment service" means the business of transmitting money on behalf of an Illinois resident for the purpose of paying the resident's bills.

"Controlling person" means a person owning or holding the power to vote 25% or more of the outstanding voting securities of a licensee or the power to vote the securities of another controlling person of the licensee. For purposes of determining the percentage of a licensee controlled by a controlling person, the person's interest shall be combined with the interest of any other person controlled, directly or

indirectly, by that person or by a spouse, parent, or child of that person.

"Department" means the Department of Financial Institutions.

"Director" means the Director of Financial Institutions.

"Licensee" means a person licensed under this Act.

"Location" means a place of business at which activity regulated by this Act occurs.

"Material litigation" means any litigation that, according to generally accepted accounting principles, is deemed significant to a licensee's financial health and would be required to be referenced in a licensee's annual audited financial statements, reports to shareholders, or similar documents.

"Money" means a medium of exchange that is authorized or adopted by a domestic or foreign government as a part of its currency and that is customarily used and accepted as a medium of exchange in the country of issuance.

"Money transmitter" means a person who is located in or doing business in this State and who directly or through authorized sellers does any of the following in this State:

(1) Sells or issues payment instruments.

(2) Engages in the business of receiving money for transmission or transmitting money.

(3) Engages in the business of exchanging, for compensation, money of the United States Government or a

foreign government to or from money of another government.

"Outstanding payment instrument" means, unless otherwise treated by or accounted for under generally accepted accounting principles on the books of the licensee, a payment instrument issued by the licensee that has been sold in the United States directly by the licensee or has been sold in the United States by an authorized seller of the licensee and reported to the licensee as having been sold, but has not been paid by or for the licensee.

"Payment instrument" means a check, draft, money order, traveler's check, stored value card, or other instrument or memorandum, written order or written receipt for the transmission or payment of money sold or issued to one or more persons whether or not that instrument or order is negotiable. Payment instrument does not include an instrument that is redeemable by the issuer in merchandise or service, a credit card voucher, or a letter of credit. A written order for the transmission or payment of money that results in the issuance of a check, draft, money order, traveler's check, or other instrument or memorandum is not a payment instrument.

"Person" means an individual, partnership, association, joint stock association, corporation, or any other form of business organization.

"Stored value card" means any magnetic stripe card or other electronic payment instrument given in exchange for money and other similar consideration, including but not limited to checks, debit payments, money orders, drafts, credit payments, and traveler's checks, where the card or other electronic payment instrument represents a dollar value that the consumer can either use or give to another individual.

"Transmitting money" means the transmission of money by any means, including transmissions to or from locations within the United States or to and from locations outside of the United States by payment instrument, facsimile or electronic transfer, or otherwise, and includes bill payment services. "Transmitting money" does not include providing payment services to a seller of goods or services, a payee, or a payment processor in connection with the sale of goods or services, including (1) providing payment processing services and payment settlement services, (2) acting as an agent or service provider of entities that engage in payment processing or settlement services, or (3) receiving and disbursing currency, funds, or other value as an agent of the payee.
(Source: P.A. 92-400, eff. 1-1-02; 93-535, eff. 1-1-04.)

Section 99. Effective date. This Act takes effect upon becoming law.

From:	Venchiarutti, Robert@DBO
Sent:	Friday, May 23, 2014 9:57 AM
To:	McQuinn, Michael@DBO
Subject:	FW: Exclusive: U.S. weighs $5 million fine against ex-MoneyGram compliance chief | Reuters

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From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Thursday, April 17, 2014 12:53 PM
To: Venchiarutti, Robert@DBO
Subject: Exclusive: U.S. weighs $5 million fine against ex-MoneyGram compliance chief | Reuters

http://www.reuters.com/article/2014/04/17/us-financial-regulations-moneylaundering-idUSBREA3G18T20140417

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From: Venchiarutti, Robert@DBO
Sent: Friday, May 23, 2014 9:57 AM
To: McQuinn, Michael@DBO
Subject: FW: Texas Banking Commissioner Issues Supervisory Memorandum on Virtual Currency
Attachments: Texas Dept Bking - Supervisoy Memo -1037 re Virtual Currency 4-3-14.pdf

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From: Levine, Ezra C. [mailto:ELevine@mofo.com]
Sent: Thursday, April 03, 2014 11:37 AM
To: Venchiarutti, Robert@DBO
Subject: FW: Texas Banking Commissioner Issues Supervisory Memorandum on Virtual Currency

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PRESS RELEASE
Date: April 3, 2014

Texas Banking Commissioner Issues
Supervisory Memorandum on Virtual Currency

On April 3, 2014, Texas Banking Commissioner Charles G. Cooper issued Supervisory Memorandum 1037, Regulatory Treatment of Virtual Currencies under the Texas Money Services Act. The memorandum was issued to provide clarity and regulatory certainty for businesses and individuals engaged in the rapidly growing area of virtual currencies. It explains how the money transmission and currency exchange provisions of the Act apply to these virtual currencies generally, but focuses particularly on cryptocurrencies like Bitcoin and its progeny.

For purposes of money transmission and currency exchange, the Texas Money Services Act, codified in Texas Finance Code Chapter 151, provides narrow definitions of money and currency. Cryptocurrencies do not fit the statutory definitions of either currency or money, and consequently do not by themselves trigger the licensing requirements of the Act. However, some common business activities relating to cryptocurrency that involve the receipt of government-issued currency can trigger the licensing requirements of the Act. Supervisory Memorandum 1037 considers several general types of cryptocurrency activity and offers guidance on their licensing implications.

"At this point a cryptocurrency like Bitcoin is best viewed like a speculative investment, not as money," said Commissioner Charles G. Cooper. "However, as this innovative technology develops, the Department will continue to evaluate whether the nature of cryptocurrencies and the potential harm to the public warrant additional action."

The full text of Supervisory Memorandum 1037 can be found on the Department of Banking website<http://www.dob.texas.gov>. Questions about this memorandum can be directed to Dan Wood at 877-276-5554.

Cathey S. Richards
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Texas Department of Banking
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TEXAS DEPARTMENT OF BANKING
★ *Dedicated to Excellence in Texas Banking* ★

SUPERVISORY MEMORANDUM – 1037

DATE: April 3, 2014

TO: All Virtual Currency Companies Operating or Desiring to Operate in Texas

FROM: Charles G. Cooper, Banking Commissioner

SUBJECT: Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act

Purpose

Virtual currencies have proliferated in recent years and, particularly with the advent of cryptocurrencies like Bitcoin, have raised novel questions in relation to money transmission and currency exchange. This supervisory memorandum outlines the policy of the Texas Department of Banking (Department) with regard to virtual currencies. This policy expresses the Department's interpretation of the Texas Money Services Act,[1] and the application of its interpretation to various activities involving virtual currencies. While the popularity of Bitcoin has sparked new discourse on the nature of money and transferability of value, this memorandum seeks only to establish the regulatory treatment of virtual currencies under existing statutory definitions.

Types of Virtual Currency

In broad terms, a virtual currency is an electronic medium of exchange typically used to purchase goods and services from certain merchants or to exchange for other currencies, either virtual or sovereign.[2] As of the date of this memorandum the Department is not aware of any virtual currency that has legal tender status in any jurisdiction, nor of any virtual currency issued by a governmental central bank. As such, virtual currencies exist outside established financial institution systems. There are many different virtual currency schemes, and it is not easy to classify all of them, but for purposes of this memorandum, they can generally be divided into two basic types: centralized and decentralized.

Centralized virtual currencies are created and issued by a specified source. They rely on an entity with some form of authority or control over the currency. Typically, the authority behind a centralized virtual currency is also the creator. Centralized virtual currencies can be further divided into subclassifications that quickly become too complex to apply a universal policy. Some can be purchased with sovereign currency, but cannot be exchanged back to sovereign currency; some can be converted back to sovereign currency; some are used only for purchase of goods and services from a closed universe of merchants, while others may have a theoretically open universe of merchants. Some centralized currencies are backed by the issuer with sovereign currency or precious metals, and therefore derive intrinsic value.

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[1] Texas Finance Code Chapter 151.

[2] In this memorandum the term sovereign currency will be used to mean government-issued currencies with legal tender status in the country of issuance. In most of the literature pertaining to virtual currency, the term fiat currency is used to refer to government-issued legal tender. Technically, fiat currency is a subset of government-issued legal tender. Fiat currency has no intrinsic value; its value is established by law. By contrast, commodity backed currency has intrinsic value insofar as it represents a claim on a commodity such as gold or silver. Here, sovereign currency means both commodity-backed and fiat currency issued by a government and designated as legal tender.

In contrast, decentralized virtual currencies are not created or issued by a particular person or entity, have no administrator, and have no central repository. Thus far, decentralized currencies are all cryptocurrencies such as Bitcoin, Litecoin, Peercoin, Namecoin, and so on. A cryptocurrency is based on a cryptographic protocol that manages the creation of new units of the currency through a peer-to-peer network. The creation of cryptocurrency happens through a process called mining that basically involves running an application on a computer that performs proof-of-work calculations. When the computer performs a sufficient amount of these calculations, the cryptocurrency's underlying protocol essentially generates a new unit of the currency that can be delivered to the miner's wallet. Because users' wallets act as the connection points of the cryptocurrency's peer-to-peer network, transfers of cryptocurrency are made directly from wallet to wallet, without any intermediary, whereas transmissions of sovereign currencies must be made through one or more intermediaries such as a financial institution or money transmitter.

One important characteristic of cryptocurrency is its lack of intrinsic value. A unit of cryptocurrency does not represent a claim on a commodity, and is not convertible by law. And unlike fiat currencies, there is no governmental authority or central bank establishing its value through law or regulation. Its value is only what a buyer is willing to pay for it. Most cryptocurrencies are traded on third party exchange sites, where the exchange rates with sovereign currencies are determined by averaging the transactions that occur. Some experts consider cryptocurrency to be a new asset class that is neither currency nor commodity, but possessing characteristics of both, as well as characteristics of neither.

Analysis

Currency Exchange

Exchanging virtual currency for sovereign currency is not currency exchange under the Texas Finance Code. Finance Code §151.501(b)(1) defines currency for purposes of currency exchange as "the coin and paper money of the United States or any country that is designated as legal tender and circulates and is customarily used and accepted as a medium of exchange in the country of issuance." Because neither centralized virtual currencies nor cryptocurrencies are coin and paper money issued by the government of a country, they cannot be considered currencies under the statute. Therefore absent a legislative change to the statute, no currency exchange license is required in Texas to conduct any type of transaction exchanging virtual with sovereign currencies.

Money Transmission

Because factors distinguishing the various centralized virtual currencies are usually complicated and nuanced, to make money transmission licensing determinations the Department must individually analyze centralized virtual currency schemes. Accordingly, this memorandum does not offer generalized guidance on the treatment of centralized virtual currencies by the Money Services Act's money transmission provisions.

On the other hand, money transmission licensing determinations regarding transactions with cryptocurrency turn on the single question of whether cryptocurrencies should be considered "money or monetary value" under the Money Services Act. Under Finance Code §151.301, money transmission is "the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location." Although there is a great amount of discussion over whether cryptocurrencies should be considered money, for purposes of money transmission regulation in Texas the term is defined by statute. Finance Code §151.301(b)(3) provides that "'money' or 'monetary value' means currency or a claim that can be converted into currency through a financial institution, electronic payments network, or other formal or informal payment system." As already stated, a cryptocurrency is not currency as that word is defined in the Money Services Act. A unit of cryptocurrency is also not a claim.[3] It does not entitle its owner to anything, and creates no duties or obligations in a person who gives, sells, or transfers it. There is no entity that must honor the value of a cryptocurrency, or exchange any given unit of a cryptocurrency for sovereign currency. For comparison, under federal law U.S. coin and paper currency must be honored for payment of all debts, public charges, taxes, and dues, and the U.S. Treasury Department must redeem it for "lawful money."[4] But the owner of a unit of a cryptocurrency has no right or guaranteed ability to convert that unit to sovereign currency. The only way to convert a unit of cryptocurrency to sovereign currency is to find a willing buyer. Therefore cryptocurrencies as currently implemented cannot be considered money or monetary value under the Money Services Act.

Statement of Policy

Because cryptocurrency is not money under the Money Services Act, receiving it in exchange for a promise to make it available at a later time or different location is not money transmission. Consequently, absent the involvement of sovereign currency in a transaction, no money transmission can occur. However, when a cryptocurrency transaction does include sovereign currency, it may be money transmission depending on how the sovereign currency is handled. A licensing analysis will be based on the handling of the sovereign currency.

To provide further guidance, the regulatory treatment of some common types of transactions involving cryptocurrency can be determined as follows.

- Exchange of cryptocurrency for sovereign currency between two parties is not money transmission. This is essentially a sale of goods between two parties. The seller gives units of cryptocurrency to the buyer, who pays the seller directly with sovereign currency. The seller does not receive the sovereign currency in exchange for a promise to make it available at a later time or different location.

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[3] The legal definition of a claim can essentially be stated as a right enforceable by a court. *See* Black's Law Dictionary 264 (8th ed. 2004).

[4] 31 U.S.C. §5103; 12 U.S.C. §411 ("The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal Reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank.")

- Exchange of one cryptocurrency for another cryptocurrency is not money transmission. Regardless of how many parties are involved, there is no receipt of money, and therefore no money transmission occurs.
- Transfer of cryptocurrency by itself is not money transmission. Because cryptocurrency is not money or monetary value, the receipt of it in exchange for a promise to make it available at a later time or different location is not money transmission. This includes intermediaries who receive cryptocurrency for transfer to a third party, and entities who, akin to depositories, hold cryptocurrency on behalf of customers.
- Exchange of cryptocurrency for sovereign currency through a third party exchanger is generally money transmission. For example, most Bitcoin exchange sites, such as the failed Mt. Gox, facilitate exchanges by acting as an escrow-like intermediary. In a typical transaction, the buyer of cryptocurrency sends sovereign currency to the exchanger who holds the funds until it determines that the terms of the sale have been satisfied before remitting the funds to the seller. Irrespective of its handling of the cryptocurrency, the exchanger conducts money transmission by receiving the buyer's sovereign currency in exchange for a promise to make it available to the seller.
- Exchange of cryptocurrency for sovereign currency through an automated machine is usually but not always money transmission. For example, several companies have begun selling automated machines commonly called "Bitcoin ATMs" that facilitate contemporaneous exchanges of bitcoins for sovereign currency. Most such machines currently available, when operating in their default mode act as an intermediary between a buyer and seller, typically connecting through one of the established exchange sites. When a customer buys or sells bitcoins through a machine configured this way, the operator of the machine receives the buyer's sovereign currency in exchange for a promise to make it available to the seller. However it is worth noting that at least some Bitcoin ATMs can be configured to conduct transactions only between the customer and the machine's operator, with no third parties involved. If the machine never involves a third party, and only facilitates a sale or purchase of Bitcoins by the machine's operator directly with the customer, there is no money transmission because at no time is money received in exchange for a promise to make it available at a later time or different location.

A cryptocurrency business that conducts money transmission must comply with all applicable licensing provisions of Finance Code Chapter 151 and of Title 7, Texas Administrative Code, Chapter 33. In addition, several considerations should be highlighted. First, because a money transmitter conducting virtual currency transactions conducts business through the Internet, the minimum net worth requirement under Finance Code §151.307 is $500,000.[5] Be advised that the Commissioner may increase the required net worth up to a maximum of $1,000,000 based on the factors set out in §151.307(b). Second, a license holder may not include virtual currency assets in calculations for its permissible investments under Finance Code §151.309. Lastly, pursuant to Finance Code §151.203(a)(3) the Commissioner requires that license applicants who handle virtual currencies in the course of their money transmission activities must submit a current third party security audit of their relevant computer systems. Because the new technological paradigm created by cryptocurrencies has brought with it new risks for the consumer, it is incumbent on a license applicant to demonstrate that all virtual currency is secure while controlled by the applicant.

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[5] Under §151.307(a), a minimum net worth of $500,000 is required if a business operates through five or more locations. It has been the Department's policy that license holders operating through the Internet are considered to be in more than five locations. *See http://www.dob.texas.gov/forms/corp-mw01.htm#netw*

STATE OF CALIFORNIA -- BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY **EDMUND G. BROWN JR.,** ***Governor***

DEPARTMENT OF BUSINESS OVERSIGHT
Ensuring a Fair and Secure Financial Services Marketplace for all Californians

JAN LYNN OWEN
Commissioner of Business Oversight

MEDIA RELEASE

For Immediate Release
April 30, 2014

Contact:
Mark Leyes (916) 322-7180

California Department of Business Oversight Issues Advisory on Virtual Currencies

SACRAMENTO, CA (April 30, 2014) – The California Department of Business Oversight has issued an advisory regarding the risks associated with virtual currencies, also known as crypto-currencies, virtual money, or digital cash.

"Virtual currencies have piqued the interest of many consumers and investors, while at the same time raising concerns about risks among regulators and consumer advocates," said Commissioner of Business Oversight Jan Lynn Owen. "While the Department determines whether virtual currency exchanges fit into a traditional currency regulatory framework, this advisory provides important warnings."

The document provides advice to consumers and investors on the risks of using or investing in virtual currencies, including:

- Virtual currency exchanges are unregulated and transactions are considered high-risk due to the vulnerability of exchanges to cyber-attacks.
- Some virtual currencies have been associated with criminal enterprises and the potential for investment loss is significant.

In February 2014, Commissioner Owen from California was asked to join the Conference of State Bank Supervisors (CSBS) Emerging Payments Task Force, made up of nine state banking regulators. The Task Force will study changes in payment systems to determine the potential impact of emerging technology in financial services on consumer protection, state law, and banks and non-bank entities chartered or licensed by the states.

The consumer advisory on virtual currency may be viewed at http://www.dbo.ca.gov/Consumers/Advisories/Virtual_Currencies_0414.pdf. Consumers are encouraged to thoroughly research any and all investment opportunities before making a transaction.

On July 1, 2013, the Department of Corporations and the Department of Financial Institutions merged to become the Department of Business Oversight. California consumers should contact the Department of Business Oversight to check on the licensing and standing of the companies, investments or other financial services they are considering at www.dbo.ca.gov or by calling 1-866-275-2677.

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What You Should Know About Virtual Currencies

Virtual currencies have been around almost as long as the Internet and in the last few years they have evolved rapidly towards a product suitable for the financial mainstream. With that rapid evolution has come many questions—legal, practical, technological and otherwise—about the promise and potential of virtual currencies. This bulletin is intended to provide the basics of virtual currency: what they are and the risks to contemplate if you're considering exchanging and investing in virtual currencies.

What are virtual currencies?

Virtual currencies (also called crypto-currencies, virtual money, or digital cash), are essentially unique, typically encrypted, computer files that can be converted to or from a government-backed currency to purchase goods and services from merchants that accept virtual currencies. You can buy these virtual currencies online using a virtual "wallet" on your PC or smartphone and, in some states, at kiosks and stores. Virtual currency is accepted as currency by some businesses, exchanged for cash by others, and even purchased as an investment.

What are the risks involved with using and investing in virtual currencies?

Exchanging Virtual Currencies

Virtual currency transactions are considered high-risk due to the vulnerability to cyber-attacks—of which there have been many. In March 2014, "Mt.Gox," the largest and best-known exchanges announced that Bitcoins (a prominent virtual currency) worth $409 million had been hacked and stolen. Mt.Gox abruptly declared bankruptcy, leaving more than one million people around the world unable to recover their funds. Virtual currency exchanges are unregulated, meaning there is little recourse to recover lost funds and, unlike deposits in insured banks and insured credit unions, there is no deposit insurance.

Investing in Virtual Currencies

As with many new investment opportunities, fraud potential is high. Some virtual currencies are held anonymously, which may facilitate fraudulent transactions and make recovering investment losses nearly impossible. There may also be challenges to verify receipt of transfers, to gain access to locked accounts, or to resolve stopped trades.

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Other risks associated with virtual currencies:

- Few consumer protections without licensing. Virtual currencies are not regulated by a government. California has been working with virtual currency industry leaders and other state and federal regulators to evaluate businesses engaging in virtual currency transactions for possible licensing.
- Difficult to recover if stolen. Unlike a stolen credit card, if you are using the virtual currency like Bitcoin and it is stolen or stored on a personal computer or smartphone that is stolen, lost or destroyed by accident, there is no way for you to identify and recover them.
- Emerging technology. Virtual currency technologies are evolving rapidly and a currency used today could be obsolete tomorrow. Technical problems and glitches have not been uncommon with many types of virtual currency.
- Value fluctuates. For example, between March 2013 and March 2014, the value of the virtual currency Bitcoin fluctuated between $100 and $1200.
- Uncertain tax implications. Under a recent IRS ruling, all virtual currencies will be treated as property for tax purposes and any value gains must be declared (and taxed) as a capital gain—a complicated calculation given the fluctuating value.
- Association with criminal enterprises. Some virtual currencies have been used for illegal drug transactions, arms trading, money laundering, and other criminal activity. To the extent these types of exchanges are associated with a form of virtual currency, users of that virtual currency risk having their investment lost if authorities shut them down.

Consumers should be wary of investment opportunities that promise high rates of return with little or no risk. Always thoroughly research any investment opportunity or offer.

RESOURCES

FinCEN guidance

The Financial Crimes Enforcement Network (FinCEN), a bureau of the United States Department of the Treasury, has issued guidance clarifying the applicability of the Bank Secrecy Act to persons creating, exchanging and transmitting digital or virtual currency. FinCEN also issued guidance regarding virtual currency and investors. See www.fincen.gov.

Internal Revenue Service

The Internal Revenue Service (IRS) has provided guidance on how existing general tax principles apply to transactions using virtual currency. See. www.irs.gov.

Consumer Services Office

Contact the Department of Business Oversight to determine the license status of any financial institution, company or individual and to determine whether disciplinary actions have been issued.

Ask a Question or File a Complaint

Help us protect consumers! If you are a victim or you suspect a licensee of the Department has violated the law or is involved in financial or investment fraud, please file a complaint. Call the Department of Business Oversight Consumer Services Office at 866-275-2677 for a complaint form or file online.